



EVIDENCE EXCHANGE UPDATE

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INDUSTRY UPDATE

American Bar Association Digital Evidence Project Survey Completed

In March 2005, the ABA Section of Science & Technology published the Digital Evidence Project Survey's preliminary findings. The study was completed jointly by Evidence Exchange; Lewis and Roca, LLP; and Navigant Consulting, Inc. It surveyed over 260 highly experienced corporate counsel concerning their practices with electronically stored information. On behalf of each survey respondent, the Digital Evidence Project Survey Subcommittee donated ten dollars to the American Red Cross tsunami relief efforts. The preliminary highlights cluster around five key points: pre-discovery meeting outcomes and value, production format, participants' familiarity with proposed amendments to the Federal Rules of Civil Procedure (FRCP), organizational changes in electronic information storage due to electronic discovery, and the effect of electronic discovery on settlements. Since 2000, the survey respondents' companies have dealt with over 60,000 matters involving electronic discovery issues. According to Digital Evidence Project member and Evidence Exchange CEO and cofounder, Michael Prounis, "The respondents' intimacy with such issues makes this survey a comprehensive, and perhaps unique, collection of experience and views on the subject of discovering electronically stored information."

Pre-discovery Meetings and Value

The survey asked the respondents to supply detailed information regarding their most recent cases involving electronically stored information. The survey results revealed that pre-discovery meetings regarding electronic information occurred in a minority of recent cases (25.5 percent). In most meet-and-confer sessions, the topics of discussion in-

cluded: the form in which electronically stored information would be produced, the production of e-mail, and the preservation of electronically stored information. The respondents also indicated that, although not discussed in all reported meet-and-confer sessions, the majority of pre-discovery conferences also included the topic of protection against the inadvertent production of privileged material. Although meet-and-confer pre-discovery meetings occur in only a minority of cases, it appears that when they do occur parties generally reach an agreement on the issues without a court order.

Form of production:

- 75 percent of respondents reached an agreement independently
- 15 percent agreed with help from the court
- Only 10 percent indicated that the court ordered the form of production

E-mail discovery issues:

- A mere 16.1 percent of respondents indicated that a court order was needed

Preservation of electronically stored information:

- 92.4 percent reported that they agreed with (16.5 percent) or without (75.9 percent) the court's assistance

Privilege waiver:

- 96 percent of respondents who discussed the issue reached an agreement with (19.2 percent) or without (76.9 percent) the court's assistance
- Only 3.8 percent indicated that the court had to mandate the solution

A minority of respondents expressed opinions regarding pre-discovery meetings' effect on the cost of discovery. Of these, the majority (53.3 percent) believed that these meetings reduced discovery costs moderately or substantially; 39.2 percent felt

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EVIDENCE EXCHANGE INDUSTRY UPDATE

Survey Completed *continued*

that there was no effect on cost. A minority of those responsive felt that pre-discovery meetings increased costs moderately (5.8 percent) or substantially (1.7 percent).

Form of Production

The survey found that, despite an increase in electronically stored information, most productions during litigations still occur in paper form. 46.3 percent of respondents reported that they agreed to produce electronic data as paper. Just 10 percent of respondents reported that they agreed to produce electronic information in a searchable form that included metadata (i.e. one of the two default formats contemplated by the proposed FRCP amendments). Similarly, only 30 percent of respondents produced a native format (the second default format being considered).

Respondents also indicated that inadvertent production of privileged information is a real-world concern: 12 percent of respondents reported incidents of inadvertent production.

Familiarity with Proposed Amendments to the FRCP

Despite a three-year effort by the Federal Judiciary to fashion new rules for handling electronic discovery in litigation, the vast majority of the respondents employed by major US corporations remain unfamiliar with the proposed federal rule changes. Only 17.6 percent of the respondents indicated familiarity with some or all of the proposed amendments. A full

33.7 percent of the respondents did not know that there were amendments. The remainder knew that proposed amendments existed but were not familiar with the amendments' details.

The survey also found that the respondents, once they were informed about the specific practice areas the rules would address, generally supported the policies embodied in the proposed amendments

Organizational Changes in Information Storage Due to Electronic Discovery

A majority of the respondents indicated that electronic discovery realities have led to changes in the records management policies of their organization, yet 18.7 percent reported no change in their records management policies. A slight majority of respondents indicated that the number of days that their organization stores records has not decreased, indicating that the size and volume of corporate archives continues to grow.

Effect of Electronic Discovery on Settlements

Most respondents did not agree with the statement that their organization settled its most recent case in order to avoid electronic discovery's financial costs. Only 10.5 percent agreed with the statement at all, and of those only 3 percent agreed strongly.

For a complete copy of the preliminary report, visit the ABA Section of Science & Technology's website at:

<http://www.abanet.org/scitech/digitalevidencesurvey.pdf> ■

Committee on Rules of Practice and Procedure Considers Survey Evidence

On February 11, 2005, Michael Prounis joined fellow ABA Digital Evidence Project members in testifying before the Judicial Conference's rulemaking body. The hearing concluded the sixth-month public comment period on the proposed FRCP amendments. Prounis and George Paul of Lewis and Roca, LLP, testified that the survey found that US corporate counsel perceives a need for FRCP amendments. The committee includes such influential authors of digital evidence case law as the Honorable Lee Rosenthal, the Honorable Nathan Hecht, the Honorable David Levi, and the Honorable Shira Scheindlin, among others. These committee will now take the hearing's testimony under

advisement before determining whether or not it should submit the amendments for full approval. Speaking of the survey's role in the amendment debate, Prounis noted: "We were looking to gain an untapped perspective and judge the real needs of our clients. This study certainly accomplished that goal, and we were very excited to present our findings to the committee." ■

ABA Thanks Evidence Exchange

Ivan K. Fong, chair of the American Bar Association's Committee on Science & Technology, officially thanked Evidence Exchange for its role in the Digital Evidence Project Survey. "Without your company's support this project would not have been possible" wrote Fong. ■

Forrester Research, Inc. Recognizes the Secure Digital Photocopier Technology

The independent technology research company Forrester Research Inc. reviewed the benefits and challenges an electronic production poses to medical evidence research. The company prepared its findings for a consulting project with the US Social Security Administration. The research opens up the health and human service industry's relatively unexplored territory of electronic evidence. Forrester Research, Inc. found increasing support for electronic evidence within the field. However, the company also noted the difficulty of establishing a precise chain of evidence. As an alternative to using first-person testimony to authenticate documents, the analysts suggested that the Secure Digital Photocopier and its digital watermarking technology may meet medical evidence researchers' needs. ■

LAWCAST Features Electronic Discovery

Motivated by recent high-profile electronic discovery cases, *LAWCAST* featured Michael Prounis's analysis in their "Tip of the Month" segment. This monthly publication provides audio legal news in an effort to brief lawyers about current industry trends. The publication discusses the Securities and Exchange Commission's recent ten million dollar fine against Bank of America and the *Zubulake* decision, in which the Honorable Shira A. Scheindlin (SDNY) sanctioned the defense for destroying, or failing to produce in a timely manner, electronic evidence. The "Tip of the Month" segment notes the growing number of problematic cases concerning electronic evidence. The segment outlines the new issues lawyers need to be attuned to, including document retention policies, native document productions, and the need for agreed-upon electronic discovery guidelines. As Prounis notes in the *LAWCAST* segment, the drive towards native document production is itself changing the rulebook. Prounis comments that because requesting party must find the document production format useful, "Dumping some proprietary software format on an opponent and saying, 'Here's your native document production' probably is not going to work anymore. You have to work to assist a conversion and possibly provide the appropriate software." The *LAWCAST* segment typifies a growing attempt to educate litigators about electronic evidence's importance to the legal community at large. ■

Evidence Exchange Executive Update

In our third annual report, I am pleased to report that Evidence Exchange continues meet client expectations and deliver excellent results. Our team serves as preferred providers to the leading New York and Washington, D.C. law firms. We also maintain relationships with a number of national law firms and major corporations. While our processing capacity grows, our pricing continues to drop, as a reflection of both our lower unit prices and effective strategies when confronted with modern day volumes. We continue to weave the notion of value-based consulting into all of our services. Today, Evidence Exchange focuses primarily on electronic data discovery processing, which includes the collection and preservation of electronically stored information (ESI); the filtering, deduplication, and searching of ESI; metadata extraction; exception processing; creation of load files; generation of numbered and/or marked TIFF, PDF, or paper; and the preparation and management of native file productions.

With so much changing in the world of electronic data discovery, we continue to reach out through the ABA Digital Evidence Project, The Sedona Conference®, and Evidence Exchange's Executive Roundtable Series on Best Practices to help frame the emerging debate. The Digital Evidence Survey subcommittee presented the findings from our scientific survey on the proposed changes to the Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. We expect our involvement in these types of initiatives to increase in 2006 and beyond.

The proposed changes to the FRCP make this an exciting time to participate in electronic data discovery. We owe so much to our clients. They reward us with the ultimate compliment—their continued trust and confidence. Evidence Exchange is well positioned for future growth and will work hard to deliver creative solutions to our clients and to the industry at large. We appreciate the opportunity to be of service to the New York and Washington, D.C. markets.

Best wishes for continued success,

Michael Prounis, Myron Eagle and all of the Evidence Exchange team ■

EVIDENCE EXCHANGE IN THE NEWS

■ Ralph Linderman incorporated the Digital Evidence Project's survey results into an article that was published by the Bureau of National Affairs, Inc. in its February 24, 2005 *Daily Report for Executives*. BNA, Inc. comprises a network of correspondents and reporters specializing in legislation coverage. Linderman's article summarizes the survey results while outlining the future trajectory of the possible FRCP amendments.

■ Jason Krause of the *ABA Journal* eReport included the Digital Evidence Project Survey evidence in his March article, "Some Cases Settle to Avoid e-Discovery Costs." Krause cites the survey respondents' vast experience with electronic discovery. He contrasts this experience with the low percentage of meet-and-confer sessions they practice. He concludes that lawyers, while highly knowledgeable in the area, can improve on their current storage and production practices for electronic documents in order to avoid being forced into a settlement.

Krause's article can be found at:

<http://www.abanet.org/journal/ereport/m25edisc.html>.

■ In a special segment addressed to in-house counsel, the Pike and Fisher March 2005 publication, *Digital Discovery & e-Evidence*, also ran an article on the survey. The article includes an executive summary by Michael Prounis and George Paul of the survey's results.

■ Jason Krause interviewed Michael Prounis for his *ABA Journal* article on database discovery. "The Paperless Chase" finds that today's litigators and judiciary have not reached a consensus in this matter. From the diverse body of existing case law, to a database's particular propensity to become incomprehensible outside of its native format, to the contention about the very definition of a database, Krause writes, "[a]bout all that is clear at this point is that a database is indeed discoverable."¹

Krause does not find the situation untenable, however. He considers the ways in which the new rules under consideration by the Federal Judiciary will facilitate electronic discovery negotiations. Krause also examines the ways in which technological innovations such as database viewers, fat PDFs, and Evidence Exchange's ability to digitally notarize documents provide solutions to the thorny legal problems database productions raise. Additionally, Krause investigates the role of neutrals. Krause reports that experts in the field such as Prounis have increasingly been employed as special masters that work to marry legal and technical knowledge to negotiate a unique discovery protocol for every case.

1. Jason Krause, "The Paperless Chase." *ABA Journal* 91 (April 2005): 48-53.

EVIDENCE EXCHANGE IN THE COMMUNITY

■ Evidence Exchange continues to give our largest charitable donations to MFY Legal Services, Inc.—an independent not-for-profit law firm dedicated to providing free, civil legal services to individuals, families, and community groups. We were proud to join our colleagues as benefit journal advertisers for MFY's Annual Benefit.

■ In December, Evidence Exchange will once again host the Executive Roundtable Sessions on Best Practices in Electronic Records Management and Retention. The roundtable sessions are designed to help companies develop an electronic-records risk profile and to speak to industry experts and colleagues who are wrestling with similar ESI issues.

■ The founders of Evidence Exchange have been in the electronic data discovery community since the late 1980s. Increasingly, we find ourselves renewing relationships with firms that we have known and worked with since the field was created. Evidence Exchange has been called the "best" electronic discovery solution, particularly when dealing with a production that involves native files. Find out why so many of the leading New York and Washington D.C. law firms hire Evidence Exchange to be their preferred electronic discovery provider; visit our website at www.evidenceexchange.com.



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