

ARKFELD'S

# ELECTRONIC DISCOVERY AND EVIDENCE

Volume 1, Issue 1 March, 2005

## E-DISCOVERY NEWS

### Transition to Electronic Information.

"The ubiquitous use of computers for creating electronic information has dramatically changed discovery and admission of case information. Whether in business, government or at home, information is being created in an electronic format. "According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper." *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002). Not only is this change pervasive, it has occurred quickly.

In a short period of time technology, computers and the Internet have radically changed the way we create and transmit information. In 1975 the first microcomputer was introduced which replicated the power of larger computers into a small

desktop. This breakthrough was the result of the miniaturization of new microprocessor technologies called semiconductors. These were followed by the introduction of the first word processing software in 1978, which enabled people to easily write and change text and graphics. Over the next 20 years, computers found their way into millions of households and businesses. One commentator noted, "[i]n 1991 companies for the first time spent more on computing and communications gear . . . than on industrial, mining, farm, and construction machines. Infotech is now as vital . . . as the air we breathe." Thomas A. Stewart, *The Information Age in Charts*, Fortune, April 4, 1994, at 75-79. . . "

Excerpt from Chapter 1, *Electronic Discovery and Evidence* treatise (2004-2005) (available from Law Partner Publishing, LLC.)

## RECENT NEWS STORIES

## SPECIAL POINTS OF INTEREST:

- Register for ALM's E-Discovery Conference and get a FREE copy of the **Electronic Discovery and Evidence** treatise. See inside for details.
- This conference will present a unique presentation format in having a plaintiff's and defendant's litigation team (attorney, forensic expert and service bureau vendor) discuss their E-Discovery strategies and present their case before a federal judge.

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## E-DISCOVERY SPRING CONGRESS CONFERENCE



*A DAY IN THE LIFE OF AN  
e-DISCOVERY CASE*

*April 13, 2005*

*The Palace Hotel • San Francisco, California.*

There will be three sessions or “Acts” that will feature real-life scenarios and highlight the actual issues and solutions that an e-Discovery case can bring. Each “Act” will feature two separate teams - one team will represent the plaintiff and another

team will represent the defense.

**PLAINTIFF TEAM:**  
Plaintiff’s Lawyer(s)  
Forensic Specialist  
EDE Processing Specialist

**DEFENDANT TEAM:**  
Defendant Lawyer(s)  
Forensic Specialist  
EDE Processing Specialist

**FREE copy of Electronic**

### **Discovery and Evidence treatise**

American Lawyer Media has announced that they will be providing the first 100 paid registrants to their E-Discovery conference in San Francisco with a FREE copy of Arkfeld’s “Electronic Discovery and Evidence” treatise. For more details click here [E-Discovery Conference](#) or visit

[www.ediscoveryshow.com](http://www.ediscoveryshow.com)



## EDE PRACTICE TIPS

### **E- Mail Tips**

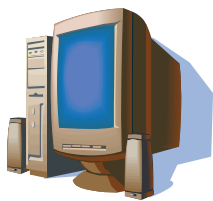
“ Deleted e-mail may be available on a backup server, tapes or the employee may have kept a separate copy for themselves“.

- Often the opposing party will refuse to disclose e-mail arguing that the corporate policy is that e-mail is not maintained more than 30 days. However, it is almost certain that employees will retain e-mail for a longer period of time using secondary

storage media and devices such as the hard drive of the user’s computer.

- Always keep in mind that even though e-mail may be deleted from the e-mail server or user’s computer that it may be available on backup tapes or on other e-mail devices used by the recipient. For example

many e-mail servers permit the user to download all of the e-mail to a desktop computer, but also leave a copy on the server. If the same user connects to the server using a laptop, then the same e-mail can be downloaded to the laptop.



- If a corporation has a short retention policy, such as 14 days, it may be a sign that the corporation has had to disclose electronic records in an unrelated case. Determine if e-mail has been preserved in an unrelated lawsuit.
- Determine how many e-mail addresses are avail-

able for each person related to the litigation and whether or not he or she changed e-mail address or ISPs during the relevant time.

- If you are outside counsel, then you should develop a clear understanding of your client’s e-mail systems. This would include the capa-

bility and methods available to search the client’s e-mail for relevant information and, also, to determine the number of e-mail that would be retrieved based on the searches. You need to also know whether backup and archived e-mail files are retained.

## BIG FOUR ACCOUNTING FIRM DEFAULTED

*In re Telxon Corp. Securities Litigation*, CIV.01-1078, 2004 WL 3192729, at \*33 (N.D. Ohio, July 16, 2004).

The Court recommended default judgment on liability against Pricewaterhouse-Coopers, LLP, stating, "PwC failed at the start of discovery to check thoroughly its local servers and its archives for relevant documents, failed to compare the

various versions of relevant documents on those databases, failed to produce documents as they were kept in the ordinary course of business, and failed to reproduce thoroughly and accurately all documents and their attachments. Prior to litigation PwC had permitted destruction of documents despite committing to their preservation. Despite these failures, PwC time and time again told the court and the parties that it had

made a complete disclosure of all relevant documents and attachments and that it had produced them in the order in which they were stored by PwC. The only conclusion the court can reach is that PwC and/or its counsel engaged in deliberate fraud or was so recklessly indifferent to their responsibilities as a party to the litigation that they failed to take the most basic steps to fulfill those responsibilities."



## EVIDENCE ELIMINATOR NOT ENOUGH

*DirecTV, Inc. v. Randy Borow*, CIV. 03-2581, 2005 WL 43261, at \*6 (N.D. Ill. Jan 06, 2005).

Plaintiff DirecTV filed complaint alleging that defendant pirated its TV satellite signal. The Court granted DirecTV's motion for summary judgment, in part, because of defendant's

use of the software program "Evidence Eliminator" to delete data from his computer. DirecTV's forensic expert was able to "recover some of the files that were used to help him pirate DT's signal . . . The fact that Borow deleted certain files on his computer only five weeks after the start of this litigation

creates an inference that he destroyed evidence that would have been harmful to his defense."

Forensic Expert  
Able to Recover  
Some Computer  
Files Deleted by  
Evidence  
Eliminator

## ROWE ENDS AT THE TRIAL STAGE

*Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, CIV. 98-8272, 2005 WL 22833 (S.D.N.Y. Jan. 5, 2005).

The infamous cost-shifting Rowe case has been laid to rest in the trial court by the granting of summary judgment against the plain-

tiffs who were concert promoters claiming that booking agencies and other promoters had engaged in discriminatory and anti-competitive practices. Of note, the Court found that the plaintiffs had violated Judge Francis's order by searching employee's mailboxes without permis-

sion and failed to produce for foundational purposes hard copies of e-mails allegedly supporting an exhibit used to counter the summary judgment motion.





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**GUIDING YOUR ELECTRONIC  
DISCOVERY AND EVIDENCE DECISIONS**

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Whether you are an attorney, legal assistant, law student, service bureau vendor or an instructor, this site is the place to find legal solutions to today's technology challenges, ranging from traditional textbooks and supplements to CLE programs, and companion websites.

## RESOURCES

### Consulting Services

Arkfeld and Associates is available to provide consultation re the retention, discovery, production or admissibility of electronic evidence. Visit [Arkfeld and Associates](http://www.arkfeldandassociates.com) site at [www.arkfeldandassociates.com](http://www.arkfeldandassociates.com).

### E-Discovery Training

To bring a CLE approved *Electronic Discovery and Evidence* training session to your firm or organization contact [seminars@edecenter.com](mailto:seminars@edecenter.com) or visit [www.edecenter.com](http://www.edecenter.com).

### Electronic Discovery and Evidence treatise

To order a copy of the acclaimed 2004-2005 edition of the *Electronic Discovery and Evidence* treatise visit Law Partner Publishing, LLC. ([www.lawpartnerpublishing.com](http://www.lawpartnerpublishing.com)).

### Upcoming EDE Sessions

April 1, 2005 Littler Mendelson Employment Conference – Phoenix, AZ

April 13, 2005 E-Discovery Conference – American Lawyer Media - San Francisco, CA

May 23, 2005 MER Conference – Chicago, Ill.

June 13, 2005 LegalTech – Los Angeles, CA.

June 18, 2005 State Bar of Arizona Annual Conference—Tucson, AZ

### Companion Technology Sites

Electronic Discovery and Evidence Center  
([www.edecenter.com](http://www.edecenter.com))

The Electronic Discovery and Evidence Blog  
(<http://arkfeld.blogs.com/ede/>).

The Digital Practice of Law  
([www.arkfeld.com](http://www.arkfeld.com))

The Digital Practice of Law Blog  
(<http://arkfeld.blogs.com/dpl/>)

