

ARKFELD'S

# ELECTRONIC DISCOVERY AND EVIDENCE

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## E-DISCOVERY ARTICLE

### *A Call for Collaborative Action*

By  
Michael R. Arkfeld, Esq.

*"It is not necessary to change. Survival is not mandatory."*

- W. Edwards Deming

Requesting and producing discovery material in litigation has undergone a radical change - yet most practitioners cling to the paper past. In the 1850's when Abraham Lincoln practiced law he managed his client's information using paper folders. Today, most practitioners still adhere to this way of practicing law, though now we see boxes upon boxes of paper documents. Times have changed. Computer technology and the Internet have transformed litigation from a sea of paper to a sea of electronic evidence. "According to a University of California study, 93% of all infor-

mation 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).

The volume is expanding at a dizzying rate. In 2002 alone about 5 exabytes of new information was created. "How big is five exabytes? If digitized with full formatting, the seventeen million books in the Library of Congress contain about 136 terabytes of information; five exabytes of information is equivalent in size to the information contained in 37,000 new libraries the size of the Library of Congress book collections." Peter Lyman & Hal R. Varian, *How Much Information*, University of California at Berkeley, School of Information Management and Systems (Oct. 27, 2003) available at <http://www.sims.berkeley.edu/how-much-info-2003>.

(Cont. on page 3).

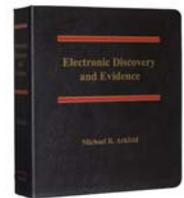


## RECENT CASES

**Preliminary Injunction Granted to Return Computers and Data.** The Court issued a P.I. requiring a former employee to return laptop computers, thousands of e-mail and other data obtained from the employer. The plaintiff's privileged documents were first to be removed from the collection by a forensic firm which costs were to be paid by the plaintiff. *Henry v. IAC/Interactive Group*, 2006 WL 354971 (W.D. Wash. Feb. 14, 2006)

**Court Orders Spreadsheets and Metadata to be Produced.** Plaintiffs requested that the actual "active file" electronic versions of all Excel RIF spreadsheets be produced. Court ordered that metadata and cells remained unlocked in disclosure of spreadsheets even after parties had already agreed to a TIFF format disclosure. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005)

## SPECIAL POINTS OF INTEREST:



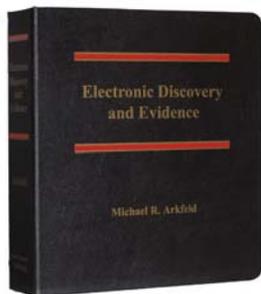
### **Do You Need to Know About Electronic Discovery to Protect Yourself and Your Clients?**

Find the answers to your questions in the ***Electronic Discovery and Evidence (2005-2006 ed.)*** treatise by Michael R. Arkfeld, Esq.

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## ELECTRONIC DISCOVERY AND EVIDENCE TREATISE



Michael Arkfeld's *Electronic Discovery and Evidence* is the comprehensive resource for discovering and admitting electronic evidence. The book addresses every aspect of this process including electronic information storage, outside expert assistance, the inherent benefits of electronic formats, as well as the laws and procedures for admitting evidence in your case.

Reviewers have labeled the book as "an extraordinarily useful, practical and accessi-

ble guide," "magnificent resource," "a solid digital discovery reference resource, packed full of detailed information and replete with case citations," "extremely valuable new book", "comprehensive and comprehensible" and a "powerhouse of information."

The *Electronic Discovery and Evidence* treatise has been recently referenced by the Honorable Shira A. Scheindlin in *Zubulake v. UBS Warburg LLC*, No.

CIV.02C1243, 2004 WL 1620866, at \* 49 (S.D. N.Y. July 20, 2004).

To order the book on a 30 day approval basis contact Law Partner Publishing, LLC at 602.993.1937 or to order online visit [www.lawpartnerpublishing.com](http://www.lawpartnerpublishing.com).

"In sum, we found your program to be extremely comprehensive and thorough on all relevant EDD issues and would recommend it to anyone wishing to keep up with the emerging importance of electronic discovery and its critical role in modern litigations. Equally impressive were the course materials you provided; especially your 2005 edition of *ELECTRONIC DISCOVERY AND EVIDENCE* which is an excellent starting point for any electronic discovery issue and a solid practice manual." Chad M. Hagan, T. Wade Welch & Associates (October 6, 2005).

## E-DISCOVERY AND BEST PRACTICES SEMINAR

Attorneys today are faced with a changing format of evidence - evidence created and stored electronically. Now, emails, text messaging, word processing documents, spreadsheets, and other electronic files may be the "smoking guns" of evidence. The ability to request and/or produce electronic evidence can mean the difference between winning and losing

your next case.

Arkfeld and Associates offers a comprehensive "E-Discovery and Evidence Best Practices" course. Course materials (electronic or paper) include the acclaimed *Electronic Discovery and Evidence* treatise, practice forms and an extensive *EDE Best Practices Workbook*. Experienced and expert faculty led by Michael

Arkfeld will provide "best practices" training onsite or offsite on electronic discovery. This CLE approved course (in most states) is focused on providing legal professionals with working knowledge of essential legal and technical issues surrounding electronic discovery. Send an e-mail to [Michael@arkfeld.com](mailto:Michael@arkfeld.com) for further information.

## RECENT CASES

**Court Finds that "Meet and Confer" Requirement Not Met by Exchanging E-mails.** After the Court set scheduling guidelines the parties "met" by exchanging e-mail and correspondence. After the discovery became contentious the Court issued an order to show cause why the par-

ties should not be sanctioned for failing to actually meet in person. The Court stated, "The Court's understanding of the phrase "meet and confer" is a conference in which opposing parties actually talk to one another." *Liebel-Flarsheim Co. v. Medrad Inc.*, 2006 WL

335846 (S.D. Ohio Feb. 14, 2006).



Now, whether your clients are facing regulatory compliance, litigation holds or internal investigations the steps of identifying, preserving, collecting, processing reviewing and disclosing information is different. Understanding concepts such as "native file format," "metadata" and "residual data" and others will have to become part of your discovery protocol

More importantly, this transition to handling the huge volume of electronic evidence requires *timely collaborative action*. In two leading discovery cases, we see the failure of collaborative action between in house counsel, outside counsel, IT personnel, witnesses, etc. resulting in severe court imposed sanctions. In both the *Zubulake* and *Morgan Stanley* cases, the failure to preserve and disclose electronic discovery resulted in an adverse and a burden of proof inference instruction that resulted in a 29 million dollar employment case and a 1.4 billion dollar commercial case verdicts. Was this lack of timely collaboration unusual? Maybe not, one survey has noted that 75% of AmLaw 200 law firms were not qualified to handle complex EDD matters. EDDix, LLC Survey, Sept. 2004. In fact, the courts have increased the risks to practitioners themselves by suggesting that failure to preserve and disclose "finds expression not only in the rules of discovery, but also in this Court's Rules of Professional Conduct, which prohibit an attorney from "suppress[ing] any evidence that the lawyer or client has a legal obligation to reveal or produce . . ." *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. Oct. 20, 2000). This coupled with malpractice risks for not properly advising your clients re electronic evidence can lead to devastating firm wide consequences.

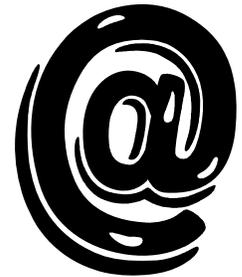
No longer can counsel sit back after notifying their clients about a preservation mandate and assume their clients are fulfilling their discovery obligations. Instead, as expressed in several leading federal discovery cases, the courts have imposed mandates requiring outside and in-house counsel, IT personnel, witnesses, and other stakeholders to *timely collaborate* on discovery. As a result, counsel and their clients and electronic discovery specialists have to re-engineer the discovery and production process to prevent the management and cost risks in handling electronic discovery. This simply requires a new way of thinking and immediate change on the part of companies and other stakeholders.

At a minimum, it is necessary to develop a set of litigation hold or regulatory compliance best practices focused on legal obligations, technology advancements and a commitment to work together. In an unprecedented fashion, the courts in several federal decisions have set forth in surprising detail discovery and compliance obligations for legal counsel. These obligations call for development of best practice protocols to ensure the preservation and disclosure of electronic evidence. These past decisions and future mandates have to be woven together with a corporation's document retention policies to ensure preservation and avoid spoliation charges. With paper discovery, one could compartmentalize the requisite identification, preservation and other production steps. Not so with electronic evidence, all of the stakeholders must be part of the procedural and substantive answer to data preservation. This will ensure that you have a "legally defensible collection".

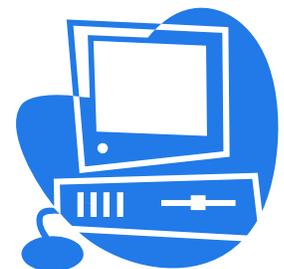
Without changing your methodology of handing evidence, it is highly unlikely that your firm or clients will survive this transition.

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Author: Michael Arkfeld, Esq. is an educator and consultant and is the author of the acclaimed *Electronic Discovery and Evidence* treatise, *E-Discovery Best Practices* book and originator of the *E-Discovery and Evidence Best Practices* seminars. He can be reached at michael@arkfeld.com.



**"No longer  
can counsel sit  
back after  
notifying their  
clients about a  
preservation  
mandate and  
assume their  
clients are  
fulfilling their  
discovery  
obligations.**





## LAW PARTNER PUBLISHING, LLC

9602 North 35th Place  
Phoenix, Arizona 85028

Phone: (602)993-1937  
Fax: (866) 617-0736

E-mail: [newsletter@lawpartnerpublishing.com](mailto:newsletter@lawpartnerpublishing.com)

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### GUIDING YOUR ELECTRONIC DISCOVERY AND EVIDENCE DECISIONS

## Editor's Corner

This month's article *A Call for Collaborative Action* focuses on the necessity to create a dynamic electronic discovery team to lessen the risk of sanctions and other adverse consequences for yourself and your clients.

This theme will be at the forefront of electronic discovery for the next several years. It will cause major changes within the corporate structure for both corporate and outside counsel in determining the responsibilities of discovering and disclosing electronic data.

It will be a time for opportunities to those who adapt to this collaborative environment and a time for risk to those who refuse to acknowledge its importance.

- Michael R. Arkfeld

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

## RESOURCES

### E-Discovery Course

To bring a CLE approved *Electronic Discovery and Evidence* course to your firm or organization contact us at [Michael@arkfeld.com](mailto:Michael@arkfeld.com) or visit [Arkfeld and Associates site at www.arkfeldandassociates.com](http://Arkfeld and Associates site at www.arkfeldandassociates.com).

### Consulting Services

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

### Electronic Discovery and Evidence treatise

To read the reviews and to order a copy of the acclaimed 2005-2006 edition of the *Electronic Discovery and Evidence* treatise visit Law Partner Publishing, LLC. ([www.lawpartnerpublishing.com](http://www.lawpartnerpublishing.com)).

### Upcoming EDE Sessions

May 5, 2006—E-Discovery Educational Course—  
South Carolina Bar, Columbia, South Carolina.

May 8, 2006—E-Discovery Keynote—ICE—Fort  
Lauderdale, FL.

September, 2006—E-Discovery Educational Course—  
State Bar of Arizona, Phoenix, Arizona.

### Companion Technology Sites

Arkfeld and Associates  
([www.arkfeldandassociates.com](http://www.arkfeldandassociates.com))

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/>)

