



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 38
Number 4 *Developments in the Law: Electronic
Discovery*

Article 1

6-1-2005

I. Foreword—Electronic Discovery

Georgene Vairo

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

 Part of the [Law Commons](#)

Recommended Citation

Georgene Vairo, *I. Foreword—Electronic Discovery*, 38 Loy. L.A. L. Rev. 1529 (2005).
Available at: <https://digitalcommons.lmu.edu/llr/vol38/iss4/1>

This *Developments in the Law* is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DEVELOPMENTS IN THE LAW ELECTRONIC DISCOVERY

I. FOREWORD

*By: Georgene Vairo**

Way back in 1986, while a junior professor at Fordham Law School, I anxiously awaited delivery of my first personal computer. Would I be able to make the transition from using a yellow pad and pen to typing on a keyboard? I was used to writing by hand. My carefully sculpted, Catholic school penmanship enabled my thinking about all things, legal and otherwise. Nonetheless, all my writing projects began with the painful process of hating my first sentence or paragraph, tearing up the yellow paper and throwing it in the trash, and starting all over again on a new sheet of paper. This was the process, which typically repeated itself countless times, that enabled me to think through my thesis, and develop my arguments. How would this process translate to the computer? I had never learned to type. Poking into a keyboard rather than holding a fine pen did not seem to be a proper stimulus to deep thinking. Yet, I made the transition.

It did not take long before I wanted to trade in my dual floppy model for a computer with a hard drive so that I could add more programs and save everything, including drafts, that I wrote. Soon, I did not have to go to the library to use a dedicated computer to access legal research databases. Then came e-mail. Hardware and

* Professor of Law & William M. Rains Fellow, Loyola Law School. I wish to thank the editors of the Loyola Law Review for dedicating this Developments issue to such an important topic to the administration of justice. I especially want to thank Professor David Leonard for working with the authors on evidence issues, Glenn Anaiscourt, '05, the Editor-in-Chief of the board, for his excellent leadership of the Journal, Heather Barber, '05, Chief Developments Editor, for her hard work and stewardship of this issue, as well as all the individual authors for their collective hard work.

software technological advances came fast and furiously, and the costs for what once had been very sophisticated equipment or programs dropped. I thought about the document discovery that I had done as an associate in antitrust cases prior to the age of the personal computer, and thought about how the advances in personal computing would have made my life so much easier. I could do almost everything from my desk. How liberating! Or, was it really?

Take my little experience and multiply it by hundreds of thousands of lawyers and business persons also making the transition from yellow pads to computers, all of them saving every draft they wrote, or e-mail received, on their computers. Or, maybe deciding to delete e-mail or memoranda they thought should not see the light of day. Of course, many of the documents prepared on computers or transmitted by computers were printed out. Thus, discovery as I knew it would continue as before. Associates would still be required to slog through mounds of paper documents. And, prior to the Age of the Personal Computer, in the Stone Age of the big IBM computers, there were some court opinions about how information from such computers could be discovered.¹ But, the existence of masses of new materials on millions of personal computers created a whole new set of issues in terms of what would be discoverable under the Federal Rules of Civil Procedure.

Some of these changes were certainly beneficial; for plaintiffs' lawyers, in particular, e-mail "may be the best thing ever invented—a record of unguarded musing between co-workers."² On the other hand, the volume of electronically-stored materials presents huge problems for large corporations. For example, Microsoft Corporation receives as many as 300 million e-mails a month from outside the company, and as many as 90 million internally.³ Microsoft's data center generates 150–200 backup tapes a day that

1. See, e.g., *Dunn v. Midwestern Indem.*, 88 F.R.D. 191 (S.D. Ohio 1980); *Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980); *United States v. Int'l Bus. Mach. Corp.*, 76 F.R.D. 97 (S.D.N.Y. 1977); *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972).

2. Pamela A. MacLean, *Electronic Discovery Is in Flux: Lawyers Clash over New Rule Proposals*, NAT'L L.J., Jan. 21, 2005, at 1.

3. Letter from Microsoft Corp. to Peter McCabe, Secretary, Committee on Rules of Practice & Procedure 1–2 (Dec. 16, 2004), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-001.pdf>.

hold about 15 terabytes of data.⁴ Each terabyte can hold as many as 500 billion typed pages.⁵ Are these electronically stored materials discoverable? What methods can be used to discover such information? What duty does Microsoft have to retain such information in an accessible form?

This Developments issue explores these questions. It focuses on the efforts of the federal courts, through the development of case law interpreting the Federal Rules of Civil Procedure, and through proposed amendments to the rules, to deal with the myriad issues that arise in the brave new world of e-discovery. Let's examine some hypothetical problems that the student articles that follow will help practitioners and judges resolve.

First, Rule 34 of the Federal Rules of Civil Procedure provides for the production and inspection of documents. To what extent is electronically stored data fair game for discovery? Consider the following problem:

Pharmaceutical company X prepares a report for submission to the FDA for a groundbreaking drug therapy. In the original draft, created on Regulatory Analyst Tom's computer, a section of the report briefly noted that there was a statistically significant increase in risk for liver failure among female patients in a particular age group. Tom e-mails the report to Senior Regulatory Analyst Wilbur, who must approve the report before it is submitted to the FDA. Wilbur inserts a comment in the section regarding liver failure, instructing Tom to delete this section because it might raise a red flag at the FDA, "which would be disastrous for shareholder expectations." Wilbur promptly e-mails the report back to Tom, who makes the requested changes. Just to be safe, Tom saves the revised version of the report under a different file name and deletes the report with Wilbur's comments. Later that day, over the corporate intranet's instant messaging program, Wilbur sends Tom a quick message thanking him for taking care of "that 'liver issue'." The report is submitted to the FDA and the drug is eventually granted full market approval.

4. *Id.* at 2.

5. MacLean, *supra* note 2, at 1.

In a subsequent class action suit by female consumers experiencing liver failure as a result of using X's medication, a key issue concerns whether company X knew that the medication posed an increased health risk for certain users prior to obtaining FDA approval. A Rule 34 request by the plaintiffs seeks to inspect and copy the hard drives of both Tom and Wilbur. Company X initially refuses to permit an inspection, claiming that the paper version of the report submitted to the FDA, as well as printouts of all e-mails between Tom and Wilbur during the time period in question, satisfies the plaintiffs' discovery needs.

Although Company X repeatedly denies having any knowledge of the increased risk for liver failure, and all other data sheets relating to the therapy's testing are nowhere to be found, plaintiffs' counsel suspects that a forensic copy of Tom's hard drive would reveal earlier versions of the report. The plaintiffs could hire an electronic discovery consultant to mine the files for embedded and meta data. The consultant could uncover the date on which Tom created various versions of the report, the date and timing of Wilbur's downloading and editing of the file sent by Tom (using meta data), and the comments with which Wilbur responded on the original document (using embedded data). The consultant could also locate the instant messaging "conversation" carried on between Wilbur and Tom on the day Tom revised the report. The plaintiffs produce evidence that Company X has an internal policy of deleting preliminary versions of FDA reports. Should the district court rule that the hard drives are discoverable materials under Rule 34?

Assuming that the materials sought are discoverable, what procedures ought the party seeking discovery use to obtain the materials? Consider another hypothetical:

Recent reports have questioned the safety of Pferck Drug Company's billion dollar headache-relieving drug Happiness. Pferck's scientists conducted a series of tests on the drug's effectiveness and side effects twenty years ago at Pferck's North Carolina lab. The scientists tracked results

in Testor, a custom computer program. They also documented results on paper. There was a comprehensive paper document retention policy twenty years ago, but no electronic document retention policy at that time; many bulky tapes from the Testor system were stored in a warehouse in Alabama. The Testor system was replaced five years ago by Drugor, and thus is no longer in use.

Also five years ago, Pferck began marketing Happiness directly to the public through heart-warming TV commercials and print ads at the direction of the company's marketing department in Boston. Many e-mails went back and forth between the scientists and the marketing department at that time. A year ago, Dr. Sklar, one of the original researchers of the drug, sent e-mails from his company-owned PDA to the Chief Medical Officer (CMO) asking to conduct new tests on Happiness (the request was turned down). As of six years ago, Pferck inserted an electronic document retention policy on page 53 of 100 of its Employee Handbook that stated: "Important electronic documents are to be maintained for as long as they are of critical importance." Backup tapes of e-mails from Pferck's thirty worldwide offices and 100,000 employees are stored in the Alabama facility as well; Pferck uses MS Outlook as its e-mail program.

A noted plaintiffs' lawyer has been collecting histories from Happiness users who have suffered a variety of serious illnesses.

Pferck's General Counsel has learned that the plaintiffs' bar has been holding seminars on how to sue for injuries associated with the use of Happiness. What steps, if any, should Pferck's General Counsel take right away?

What electronic document-related requests may the plaintiffs' lawyer request at the time that she files her class action lawsuit?

Assuming that the plaintiffs' lawyer does not receive any electronic information prior to the discovery conference, how should each lawyer prepare for that conference? How should the judge resolve controversies that remain after the

conference in regards to items such as Testor test results; the e-mails from five years ago and one year ago; information that might be found in Sklar's PDA, or on the backup tapes?

Another prominent issue in the context of electronic discovery is that it can be extraordinarily expensive. Generally, the cost of production falls on the producing party. In the two hypotheticals above, it could be very costly for the companies to comply with the discovery requests, either because of the time it would take to review the electronically stored material, or because it is no longer easily accessible technologically, and requires forensic expert help to retrieve "deleted" data or data stored in an obsolete format. Should the court order cost shifting when it decides to grant the discovery requests? When will a court consider cost shifting? Consider the following:

Patty Perfect is suing Bully Corporation for wrongful termination. Patty Perfect has made a discovery request that Bully Corporation turn over all e-mails regarding Patty Perfect's job performance, disciplinary actions taken against Patty Perfect, and Patty Perfect's workplace demeanor. Patty Perfect is reasonably certain that there is some relevant data in the e-mails requested that will support her claim. Patty Perfect worked for Bully Corporation for six years, however, and the computer network changed twice during that time.

While Bully Corporation does have the data sought, it is not easily accessed and may require expensive and time-consuming computer programming to obtain. Once it is obtained, Bully Corporation will have to expend resources reviewing the data for responsiveness and privileged information. Patty Perfect has limited her request to a certain time frame (the last two years).

Bully Corporation is much more financially able to fund the data retrieval than Patty Perfect. In response to the discovery request, Bully Corporation is seeking a protective order from the court requesting that the court shift some of the discovery costs involved in recovering the electronic documents sought to Patty Perfect. How should the court rule?

As the cost-shifting article in this Developments issue demonstrates, the emergence of e-discovery requires courts to engage in balancing acts. On the one hand, a party needs information. On the other, the costs of production may be inordinate. Courts need to weight other factors when e-discovery requests are made as well. Often, e-discovery requests implicate privilege and privacy concerns. The next student article addresses these concerns, and helps to provide answers to the following two problems. The first involves a company involved in a patent infringement case:

X Corp has sued Y Corp for patent infringement and has requested production of approximately 1,000 computer back-up tapes containing a volume of data equivalent to 61 terabytes. Y Corp has opposed the production asserting that the request is unduly burdensome particularly considering its intention to screen each document for privilege prior to production to X Corp. X Corp and Y Corp have not been able to agree on a discovery plan for the production of this material.

How can the judge tailor a discovery order that addresses both X Corp's interest in obtaining as much relevant evidence as possible and Y Corp's interest in protecting privileged communications stored in the backup tapes?

Should the court appoint a Special Master to oversee the discovery plan? If so, how should the court select the Special Master? For what aspects of discovery should he/she be responsible? If in the process of oversight, the Special Master views Y Corp documents that are privileged, has Y Corp waived its claim of privilege as to these documents? What can the court do to safeguard Y Corp against the risk of waiving its claims of privilege in this litigation? In a collateral litigation against a different party?

What steps can the parties take to reduce the amount of documents that will need to be screened for privilege? Would a "rolling" production plan that required Y Corp to perform the screening and production process in waves assist Y Corp? Would such a plan reduce the likelihood of producing privileged information?

If Y Corp inadvertently produces privileged documents to

X Corp despite its adherence to the discovery plan, will X Corp prevail in its claim that Y Corp has waived the privilege?

The second problem involves possible overreaching by a party provided access to stored data:

Stella, a shareholder of Comp Corp sued the corporate officers of Comp Corp. Pursuant to a subpoena for the production of electronic documents, Stella obtained e-mail messages relating to the litigation from Comp Corp's Internet service provider (ISP). Due to a defect in the subpoena of which Stella was aware, Stella also obtained e-mail messages from accounts of people who had no connection with the litigation. Has Stella violated the Stored Communications Act?⁶ The Stored Communications Act imposes criminal and civil liability on any person who:

[I]ntentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains . . . access to . . . an electronic communication while it is in electronic storage in such system⁷

Has Stella exceeded her authorization to access Comp Corp's ISP? Has Stella accessed electronic communications "in storage"? What are stored communications? Are they communications that have been received and unopened? Are they still considered to be "stored" after they have been opened by their recipients?

Obtaining electronic discovery is only part of the battle. The next consideration is the question whether the product of the electronic discovery is admissible. The next article discusses the Best Evidence rule. The following hypothetical provides an excellent introduction to the application of the Best Evidence rule in the context of electronic discovery.

P.J. is the owner of Mats & More, one of the country's largest sellers of yoga mats. P.J. is a citizen of Massachusetts. Mats & More is incorporated in Massachusetts, with its principal place of

6. 18 U.S.C. §§ 2701-2712 (2000 & Supp. II 2002).

7. *Id.* at § 2701(a)(1)-(2).

business in Boston. Mats & More purchases its mats from various manufacturers and then sells them in its retail boutique stores. The company also sells mats, clothing and other yoga accessories through its online store.

P.J. is very particular about the quality of the mats he buys for his stores. As a yoga devotee, he wants to make sure that the mats are comfortable and safe for his customers. P.J. usually purchases a mat before he sells it to his customers and tries it out during a few of his own yoga sessions.

P.J. recently found a new yoga mat manufacturer, Asana Mats, based in Atlanta, Georgia. After trying an Asana mat himself, P.J. was convinced that it was the most comfortable mat on the market. So, when one of the premier yoga studios in Los Angeles ("L.A."), Galaxy Yoga, contacted him to purchase a new stock of mats, he immediately thought of Asana.

Galaxy planned to open a new location in Hollywood (many of its current clients are among the brightest Hollywood stars). The studio's owner told P.J. that she absolutely had to have 500 mats by October 31 because the grand opening was planned for November 1.

P.J. contacted Asana to see if they could supply 500 of their best quality mats by October 31. The sales manager assured P.J. that it would be no problem and asked P.J. to send her the order by e-mail. P.J. opened up the e-mail program on his work computer and wrote the order. At the bottom of his message was the automatic "signature" of Mats & More, with P.J.'s contact information and the company's logo. The return address was P.J.'s account, *pj@matsnmore.com*. After sending the email order, P.J. received a return receipt (confirmation) message from Asana's account, *sales@asanamats.com*.

P.J. immediately called the L.A. studio to let it know that its mats were on the way. Before leaving for lunch, he also filled out an open order form in the Mats & More sales database. P.J. purchased this database two years ago when he could no longer manage the high volume of yoga mat

sales with a spreadsheet. Since he did not have the infrastructure to manage the database on site, he contracted with a company that maintains his Web-based inventory and sales information on its mainframe computer; this mainframe is located in Virginia. P.J. has been very happy with the database and technical support services of this company.

After lunch and his afternoon yoga session, P.J. printed out a copy of the open order and sent it to the L.A. studio, to confirm their order of 500 mats.

By October 30, the Asana order had not arrived and P.J. was very nervous, so he called the sales manager at Asana. She told him that she never received his e-mail message and so she figured that he had decided not to place the order. P.J. told her that he received a return receipt message from an Asana.com account. The manager told him that she was sorry, but she simply had no record of the order.

P.J. immediately called the LA studio and offered to purchase mats from another L.A.-based company that he had used in the past. But the owner of the L.A. studio was furious! She had told all of her Hollywood clients about the new Asana mats. She told P.J. that she didn't want his help; she would figure it out herself.

A month later, P.J. was served with a complaint, filed by Galaxy against P.J. and Mats & More in the Central District of California. Among other things, the studio sued P.J. and his company for breach of contract.

In preparing for trial, P.J. and his lawyer talk about evidence of contracts with both the L.A. studio and Asana Mats. P.J. wants to argue that Asana Mats should be liable, based on his e-mail and Asana's return receipt. As his lawyer tells him, however, a court may not allow him to use the e-mail as evidence. Although P.J. could himself testify to authenticate his e-mail message, it might still be inadmissible hearsay. P.J. could try to admit the return receipt e-mail, but Asana would probably challenge its foundation as well.

In addition, P.J.'s lawyer is worried that the studio will

offer the printout confirmation from the Mats & More database. If Galaxy lays a proper foundation for the confirmation, P.J.'s lawyer could try to challenge its admission based on the best evidence rule. But, unless there are concerns that the record has been somehow altered or manipulated, the printout will probably suffice as an "original". P.J.'s lawyer is not aware of any problems with security for the vendor that maintains the Mats & More database (e.g., hackers have not, as far as she knows, been able to access the mainframe and alter various company financials)—but this is something she will definitely want to research.

Document destruction—or "spoliation"—has always been a serious issue. The emergence of e-discovery seems to have exacerbated the problem. Whether willful or negligent, the nature of electronically stored data seems to increase the chances that vital information may be damaged or lost. How are the courts dealing with this problem? The last student article delves into this increasingly important area. Consider the following two examples:

ABC, a large corporation, collects and produces the majority of its documents electronically. Because retaining such data can be extremely burdensome, ABC has hired an information technology ("IT") staff to create a document-retention infrastructure for the company. The IT department has decided that electronic data should be stored for one year and then automatically deleted. ABC has been using this system consistently and continuously for the past two years. Recently, ABC was named as a defendant in a large, unanticipated civil suit. During discovery, the plaintiff requested a multitude of documents, some of which were over a year old. ABC has discovered that many of those documents have been deleted as a result of their document-retention infrastructure. Even at a large cost, experts have been unable to retrieve the data. As a result, ABC is unable to comply with many of the plaintiff's discovery requests. Should the court sanction ABC for its failure to produce the documents?

John works as a car salesman during the day. At night, John enjoys maintaining a personal Web site dedicated to

spreading gossip about Hollywood celebrities. He operates the website from his home computer. On January 3, John dedicates a page on the website to Amy Turner, a famous soap star. The page describes Ms. Turner's drug-related escapades on New Year's Eve. To John's surprise, he receives a letter in the mail from Ms. Turner's legal counsel on January 10. The letter states that Ms. Turner plans on bringing suit against John for the damaging and untrue statements he had made on his Web site. In an effort to protect himself, John removes his Web site from the Internet. He then takes a trip to his local electronics store and buys a copy of "Evidence Eradicator," a software program designed to permanently eliminate all traces of certain activities on one's computer. He installs and runs the software on his home computer, eliminating all evidence of his connection with the website. Within several weeks, John receives a discovery request from Ms. Turner's legal counsel, requesting production of "all Web design and editorial work concerning Amy Turner." Because John eliminated such evidence from his computer, he is unable to comply with Ms. Turner's discovery request. How should the court rule on Amy Turner's motion to sanction John for spoliation? If so, what type of sanction ought the court impose?

These hypotheticals provide just a few examples of the difficult issues that are raised by e-discovery. The law, as the student articles demonstrate, is evolving, and the federal courts are trying to keep up with e-discovery issues by proposing amendments to clarify practice in the area. It was almost thirty years ago that I sat down with my first computer. It is a testament to our courts and the attorneys practicing before them that they have been able to deal with the emerging e-discovery problems that have arisen since then. I could hardly imagine then the kinds of issues that the following articles explore, but they will provide the courts and practitioners with an excellent overview of the law in this important area and the tools to deal with the difficult problems that e-discovery present.