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The ABA Section of Science & Technology Law is pleased to invite you to the E-Discovery and Information Governance National Institute at Stetson's Tampa Law Center in Tampa, Florida January 23-25, 2013. This National Institute will provide attendees a rare opportunity to sharpen their skills in electronic discovery and digital evidence (EDDE). The curriculum will consist of case studies, a mock 26(f) meet-and-confer, a mock spoliation hearing, and panel discussions with luminaries in the field.

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- Analyze recent judicial decisions on the production of ESI and the key rules from the Federal Rules of Civil Procedure that impact e-discovery
- Provide invaluable insights on how best to prepare their technical staff and information systems to respond to requests for ESI
- Cover ESI issues for a variety of business sectors including the HIPAA HITECH requirements that mandate an enhanced standard of care for the parties producing and receiving electronic health records (EHR)
- Describe how new search technologies will lead to cost efficient, yet defensible, automated production of relevant ESI
- Examine the e-discovery implications of the increasing use of encryption, social media, and data stored in the cloud

Attendees will walk away with an understanding of how the handling of ESI has evolved and will present a hopeful prognosis that expected improvements will provide cost efficient, but defensible, management of ESI.

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# Agenda

## Wednesday, January 23, 2013

### 8:00 a.m. - Registration & Breakfast

### 9:00 a.m. - Welcome by Program Chairs

### 9:00 a.m. - 10:30 a.m. - Judicial View on Recent ESI Decisions

Hon. John M. Facciola, Hon. Paul W. Grimm, Hon. Andrew J. Peck,  
Hon. Anthony E. Porcelli, Hon. Shira A. Scheindlin

Moderators: Jon C. Stanley, Steven W. Tepler

Do recent ESI decisions advance the general understanding of ESI or are they outliers? Are certain decisional authority trends developing? Will the current view on ESI as admissible unless proven otherwise continue or will considerations of hearsay and authenticity prevail? Will the decisions on proportionality rein in the cost of e-discovery? These are some of the critical issues these renowned judges will address.

### 10:30 a.m. - 11:00 a.m. - Break

### 11:00 a.m. - 12:00 p.m. - Information Governance and E-Discovery: Friends, Foes, or Frenemies?

Martin Audet, Bennett B. Borden, Julia Brickell

Moderator: Barclay T. Blair

Information governance has emerged as a critical concept for attorneys, IT professionals, and others charged with managing their firms' information assets, especially during the discovery process. Information governance helps organizations take a holistic approach to information management that borrows best practices from legal, IT, business, and records management.

However, information governance is not a well-defined term—is it just a concept or an actionable discipline? Organizations wonder about how to implement information governance and if an information governance department is needed. Information governance has many components—each of them complex and difficult to address. IG promises many benefits, but does it help or hinder e-discovery efforts? Topics will range from the governance of “Big Data” to defensible deletion of legacy content. The panelists will discuss how information governance is shaping corporate practices and affecting the solutions landscape, examine the typical components of an information governance program, and discuss the technology that enables enforcement of IG policies. Attendees will hear strategies for encouraging legal counsel, IT, and business management to work together to manage information assets.

### 12:00 p.m. - 1:30 p.m. - Lunch

- Welcome by Lucy Thomson, Chair, Section of Science & Technology Law
- Welcome by Christopher M. Pietruszkiewicz, Dean, Stetson University College of Law

### 1:30 p.m. - 3:00 p.m. - Digital Forensics: Civil vs. Criminal - What Is the Difference?

Hon. John M. Facciola, John Jorgensen, Kristine McAlister Brown

Moderator: Kimberly Kiefer Peretti

What are the differences between criminal and civil computer forensics? A jurist, a former federal computer crime prosecutor, a civil privacy and technology litigator, and a forensic technology expert will discuss how the differences (between criminal and civil forensics) affect how they handle a case.

### 3:00 p.m. - 3:30 p.m. - Break

### 3:30 p.m. - 4:30p.m. - Emerging Technologies

Eric Hibbard, Serge Jorgensen, Robert Thibadeau, Ethan J. Wall

Moderator: Hoyt L. Kesterson II

Waiting a long time to erase a large disk? If you're using the new solid-state drives (SSD), did you know that deleting information is not working the way you think? The panel will discuss the revised National Institute of Standards and Technology (NIST) guidance on media sanitization and the impact of SSD storage devices on data retention, destruction, and forensic examination. The panel will also discuss how using the cloud or social media is likely to force changes in how to implement information governance and discovery.

# Agenda (Cont'd.)

## **4:30 p.m. – 6:00 p.m. – And a Pony Too! A Mock 26(f) Meet-and-Confer and 16(b) Hearing**

Aaron D. Crews, Hon. John M. Facciola, Thomas C. Gricks, III, Serge Jorgensen, Hoyt L. Kesterson II, Larry H. Kunin

A health insurance company is accused of selling customer information to a generic drug manufacturer to support a marketing campaign. Attorneys and their technology experts will conduct an ESI-focused mock FRCP Rule 26(f) meet-and-confer. This session will illustrate the value of cooperation between the parties and demonstrate how disputes over electronic discovery (e.g., amount of data to be produced, native format, encrypted data, search terms, protection of produced sensitive data, privilege, and preservation) will be resolved through good faith negotiation. Thereafter, counsel, supported by their technology experts, will argue matters that are still in dispute before a mock FRCP Rule 16(b) hearing held before the U.S. Magistrate. Attendees will receive unique insight into how best to prepare for and present the critical issues in these hearings.

## **Day Two – Thursday, January 24, 2013**

### **8:30 a.m. – 9:00 a.m. – Registration & Breakfast**

### **9:00 a.m. – 10:00 a.m. – The Federal Rules – Where We've Been, Where We May Be Going**

Hon. John M. Facciola, Hon. Paul W. Grimm, Prof. Richard Marcus, Hon. Andrew J. Peck, Hon. Shira A. Scheindlin

Moderator: Bennett B. Borden, George L. Paul

Important changes to the Federal Rules of Civil Procedure to address discovery of ESI went into effect in 2006. We've now had six years to operate under those new rules, and most states have adopted parallel provisions. At the same time, the rule-makers have continued to consider the utility of further rule changes. This panel is made up of many who have been involved in the rule-amendment process. It will reflect on the impact of the 2006 changes, and on the possibility that further changes may occur in the foreseeable future.

### **10:00 a.m. – 10:30 a.m. – Break**

### **10:30 a.m. – 12:00 p.m. – Can a Computer Do It Better, Faster, and Cheaper? A Discussion of Technology-Assisted Review**

Shannon Capone Kirk, Prof. Richard Marcus, Hon. Andrew J. Peck

Moderator: Maura R. Grossman

As ESI has become more prevalent, attorneys have voiced concerns that the cost of handling digital productions is expensive, especially as the amount of ESI grows. Although tools for organizing, distributing, and annotating digital data are commonplace, determination of relevance and privilege is typically still done in the same way as it was in the days of paper—using many eyeballs to read and then classify. Technology-assisted review, aka predictive coding, may be the solution that will rein in the cost of e-discovery and restore proportionality for those litigations with large volumes of ESI. Research has shown technology-assisted review can be more accurate and efficient than exhaustive manual review. The decision of U.S. Magistrate Judge Andrew J. Peck to allow the use of predictive coding in *Monique da Silva Moore v. Publicis Groupe* has generated much discussion. Even if technology-assisted review is chosen, attorneys can still wrangle over how the training of the tool should be accomplished.

### **12:00 p.m. – 1:30 p.m. – Lunch and a Talk – iPads for Lawyers**

#### **Sponsored by RECOMMIND**

Speaker: Adriana Linares, LawTech Partners, Inc.

Few technologies have so quickly and positively affected the legal profession as has the iPad. Join us for this live iPad demonstration to learn of all the amazing things your iPad can do and how it can benefit your law practice. We'll cover practical tips and discuss and demonstrate legal specific apps.

Topics will include:

- iPad tips and tricks;
- securing your iPad and protecting client information;
- useful apps for lawyers;
- working with documents and emails; and
- using iPads in the courtroom, for trial prep and much more!

# Agenda (Cont'd.)

## **1:30 p.m. – 2:30 p.m. – Managing ESI within Health Information Systems Riddled with Landmines**

Chad P. Brouillard, Barbara Drury, Patricia Trites

Moderator: Reed D. Gelzer, M.D.

Relative latecomers to computerized records, electronic health record systems (EHRs) remain proprietary and risk-laden. They are commonly absent records management functions that are considered requirements in other industries. EHRs are rarely designed for integrity or evidentiary inquiries, much less configured, tested, implemented, and/or operated for assuring trustworthy ESI. EHR systems also may include functions, such as authorship misattribution or improper amendment capabilities, that can provide means to impeach records produced by that system. Consequently, and sometimes unknown to users, these records may provide only approximations or even corruptions of the information that should have been recorded, thus providing unique challenges in supporting legal proceedings.

The panelists are field-experienced authorities on how EHRs actually work regarding compliance, medical malpractice support, and information integrity as critical aspects of ESI as well as the state of EHR standards and “certification.” Each panelist will provide specific guidance on how to prevent or mitigate hazards through the use of straightforward analysis tools that can be readily applied to disarm discovery “landmines.”

## **2:30 p.m. – 3:30 p.m. – Is That Your Stuff or Mine—Considerations for Adopting a Bring Your Own Device Policy**

Joseph M. Burton, Jason Stead, Robert Thibadeu, Lucy Thomson

Moderator: Serge Jorgensen

Organizations are increasingly allowing employees to use their own devices for business in the office and on the road. Some of this comes from not wanting to carry multiple smartphone and tablet devices and some is due to companies reducing costs by covering part of the cost for an employee purchasing their own devices, including laptops.

There are well-known concerns due to the mobile nature of the devices—how to secure company assets and knowing what data is where. New concerns come from the shared ownership aspect of the devices—how does one segregate the owner’s personal data from that of the organization? The panel will discuss the impact of BYOD on information governance, security, and discovery.

## **3:30 p.m. – 4:00 p.m. – Break**

## **4:00 p.m. – 5:00 p.m. – Feet on the Ground, Head in the Cloud—What Are the Legal Concerns for ESI in the Cloud?**

Theresa Beaumont, Debra R. Bernard, Margaret Keane, Ken Rashbaum

Moderator: Bennett B. Borden

Cloud computing services are a fast-growing industry that offers significant potential benefits to businesses, the scientific community, non-profits, local and federal government agencies, and others. However, cloud computing also raises serious legal challenges, especially in how it affects a user’s ability to identify, preserve, collect, analyze, and produce information in legal and regulatory proceedings. Experience in this area shows that these legal and regulatory challenges are preventing a wider adoption of cloud computing and are creating potentially significant risks for users who adopt this technology. The panel will discuss these legal challenges and ways to mitigate the risks concerning them, and provide real-world examples of how clients deal with them.

## **5:00 p.m. – 6:00 p.m. – The Computer Says These Are All the Documents That Are Relevant – A Mock Hearing on Technology-Assisted Discovery Production**

Hon. John M. Facciola, Maura R. Grossman, Hon. Paul W. Grimm, Hon. Anthony E. Peck, Hon. Shira A. Scheindlin

Moderator: Hon. Anthony E. Porcelli

Opposing counsel doesn’t believe that the other party’s production is complete since technology-assisted review was used instead of an exhaustive manual review. Counsel has moved to compel in the district court. Three different district judges will hear the motion and rule.

# Agenda (Cont'd.)

## Day Three – Friday, January 25, 2013

### 8:30 a.m. – 9:00 a.m. – Registration & Breakfast

### 9:00 a.m. – 10:00 a.m. – E-Discovery and Ethics

John M. Barkett, Hon. Shira A. Scheindlin, Ethan J. Wall

Moderator: Maura R. Grossman



A variety of ethical obligations and quandaries surround ESI and social media, e.g., the duty of competence and the obligation to protect confidential client information. Because most evidence is now digital, litigation preparedness requires a solid understanding of the enterprise policies and processes that govern the lifecycle of ESI. For both in-house and retained counsel, this has created heightened ethical and professional responsibilities to develop an understanding of the many IT sources and environments potentially implicated in litigation, whether local or cloud-based. The bottom line is that in this new digital era, attorneys must develop competency in digital evidence management; if not, they risk civil sanctions, ethical violations, and malpractice claims. This panel will explore some of the many new ethical dilemmas facing lawyers in the digital age. Attendees of this session will earn CLE ethics credit. (Ethics credit will be requested for this session.)

### 10:00 a.m. – 10:30 a.m. – Break

### 10:30 a.m. – 11:30 a.m. – Is It Now Time for E-Discovery Quality Standards?

Bennett B. Borden, Eric Hibbard, Christopher S. Knox, Ralph C. Losey

Moderator: Jason R. Baron

A growing consensus has emerged in recent years, reflected in published case law and commentaries, that achieving some measure of “quality control” in the e-discovery process is important. This is especially the case given the enormous and growing volume of ESI subject to discovery. This panel will discuss the state of current case law as well as report on progress toward new ISO-based standards initiative specific to the e-discovery community.

### 11:30 a.m. – 12:30 p.m. – Judicial Roundtable & Closing Remarks

Hon. John M. Facciola, Hon. Paul W. Grimm, Hon. Andrew J. Peck,  
Hon. Anthony E. Porcelli, Hon. Shira A. Scheindlin

The judges will discuss topics of interest that arose during the workshop. They will address questions from attendees that have been collected during the workshop.

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