

ELECTRONIC DISCOVERY COMES OF AGE: THE FULBRIGHT JAWORSKI STUDY

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Ah, the rites of passage. A young man turns 21, goes on the town with his friends, tosses back 21 shots, throws up and passes out. Happy Birthday son, if you can remember it. Variations on this scenario happen nationwide every day. Has Electronic Evidence come of age? If so, how has it marked its rite of passage?

It was only six years ago that we began lecturing on the subject of electronic evidence. At the time, we ran one of a handful of computer forensics/electronic discovery companies across the nation. When we warned audiences that **all** lawyers would have to become familiar with e-discovery over the next few years, we were greeted with cavalier disregard. "I don't think so – folks will pretty much go on practicing law the way they always have," was a common remark.

It was only three years ago that we lectured to a group of Circuit Court judges in Southwestern Virginia. While our hosts were uniformly gracious, they were also uniformly adamant about electronic evidence and courtroom technology. "Not in my courtroom!" several of them said firmly.

My, how times change.

Most federal court litigators have come to accept electronic discovery as a daily fact of life. While the use of e-evidence has seeped more slowly into state courts, virtually all litigators have now, however reluctantly, begun the process of educating themselves about electronic evidence.

The Fulbright Jaworski Study: ED Grows Up

The recent release of the second annual *2005 Litigation Trends Survey* by the international law firm Fulbright & Jaworski L.L.P. has made it eminently clear that electronic discovery has indeed come of age. Some things haven't changed - to no one's surprise, we are an intensely litigious society.

The survey included 354 corporate counsel (50 from the U.K., the rest from the U.S.). These were not small businesses, to be sure. The median company reported annual gross revenues of \$484 million. Still, it is startling to read that the average company in the survey juggles 37 lawsuits at a time. For \$1 billion plus companies, that number grows to a staggering 147. Keep sending Jack and Jill to law school!

Here's the ED kicker: For corporations with over \$100 million in revenues, the greatest concern of the responding general counsels and CEOs was electronic discovery. For those under that mark, the greatest worry was compliance issues. If you think about it a

moment, failure to comply will almost invariably involve electronic evidence in the ensuing compliance actions or litigation. Taken as a whole, electronic discovery has indeed, in its own fashion, painted the town red – in this case, the color of panic.

What a departure from the good old days the study reveals. 80% of the respondents now have document retention policies and 75% have litigation hold policies. Still, the respondents worry about the quality of their policies, the enormous costs of electronic discovery and the sanctions that may accompany a failure to live up to statutory, regulatory and case law requirements.

What Does All This Mean to Smaller Companies and Their Law Firms?

The big boys felt the impact of ED while most lawyers slumbered on, practicing law without a thought to electronic evidence. Only a fool would suppose that ED will stay in the stratosphere with the large firms and their clients. Inevitably, ED will drift downwards and seep into more and more small cases.

Our current caseload of forensics/ED cases may be instructive. Currently, about ¼ of our cases are divorce cases. If you're surprised, think about how often people e-mail, IM or text message their lovers. It's where the evidence is. Next time you see someone using two thumbs on a BlackBerry, you might justifiably wonder if they are telling some special someone what kind of new erotic treats they have planned for their next rendezvous. Trust us when we tell you that people will write **anything and everything** to their paramours. Our eyebrows are permanently singed from reading their missives.

Criminal cases comprise the next 25%. A depressingly large chunk of that is child porn cases, followed by everything from stalking to embezzlement to murder. Business litigation constitutes about 25% - software that doesn't work as advertised, employees who are funneling company data elsewhere, competitors that have pilfered proprietary data, etc. The final 25% is a hodgepodge of everything from terrorist cases to defamation to people who have forged wills. Perhaps 3 or 4 of all these cases involve really significant dollars. The rest are really the everyday cases that comprise the law practice of the solo/small firm practitioner – with one notable difference. ED is now a critical component. No doubt this is the tip of an immensely large iceberg. We are in fact seeing the beginning of seepage of ED into everyone's law practice.

But make no mistake about it. Most cases in our area still go from A to Z without anyone thinking about e-evidence. But the times, they are a-changing.

Fear is a Great Motivator

Lawyers have not precisely embraced electronic evidence. Their trepidations about dealing with e-evidence have only slowly abated. Their new-found willingness to deal with e-evidence seems to stem larger from fear – that they will be guilty of ineffective assistance of counsel if they ignore it, or that the other side will find a “smoking gun” unbeknownst to them. If you want to be a good lawyer, and serve your client well and

competently, there is no longer any way to evade the fact that e-evidence is a factor in a growing number of cases.

Still More Statistics

Statistics, as they say, lie. They can be manipulated to prove anything, and often are. However, no matter whose statistics you believe, all of the recent studies show that somewhere between 93-97% of all information is now created electronically. It is commonly accepted that less (some would say MUCH less) than 3% of that information will ever be converted to paper. That being the case, what lawyer worth his/her salt can afford to ignore at least the possibility of electronic evidence being relevant every time a new case is opened?

We are now sending more than 4 trillion e-mail messages a day in North America. Worldwide, we are producing 1-2 exabytes of information per year. If you're scratching your head wondering what an exabyte is, it is equal to roughly 1 trillion books.

You Can Run, But You Can't Hide

Electronic discovery's rite of passage is ongoing. However, as the Fulbright Jaworski study makes clear, ED has arrived in force. Undoubtedly in the last several years, the general counsels and CEOs of major corporations have felt very much as though they had just chugged 21 shots, though not exactly in celebration of ED's coming of age. More likely, they feel the headache/hangover effects of ED, which came on suddenly with all the force of a tornado and with nearly as little warning.

Perhaps the best thing for solo/small firm practitioners to do is heed carefully the various disasters that have befallen their larger counterparts as they became the first to encounter the full breadth and depth of ED's impact. On a smaller scale, the very same thing is likely to happen to anyone not prepared for electronic discovery. You can wish it away, will it away, even pray it away, but electronic discovery is here to stay. Just look at all the ED companies that have sprung up faster than chickweed. Mind you, many of them fail rapidly in this volatile new market, but for each one that fails, two seem to take its place.

We all wish that electronic discovery were more settled, that laws and regulations were more uniform, that case law wasn't all over the map etc. But ED is only just of age, brash, heady and volatile as any young man on his 18th birthday ever was. If you thought you could avoid ED and keep practicing law as you always did before, you'd better do a shooter or two yourself to ease the pain. ED is coming to everyone's town!

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