

Association of American Law Schools

SECTION ON LITIGATION

SECTION NEWSLETTER

December 2008

2009 Annual Meeting Program

The Litigation Section program, *E-Discovery: A Litigation Revolution?*, will be presented at 8:30 to 10:15 a.m. on Thursday, January 8, in Marina Salon E, South Tower/Level 3, San Diego Marriott Hotel & Marina.

The following discusses the Annual Meeting Program and provides a partial bibliography on electronic discovery. A more complete bibliography will be published in the *Akron Law Review* in Spring 2009.

E-Discovery: A Litigation Revolution?

The Litigation Section program focuses on the topic of discovery of electronically stored information, the so-called "e-discovery." Entitled *E-Discovery: A Litigation Revolution?*, the program seeks to explore the gamut of discovery issues raised by electronically stored information, including early planning regarding e-discovery; accessibility and search methods; issues surrounding privilege waiver, including traditional issues, new issues created by the nature of e-discovery itself, and the impact of Congress's new federal evidence rule, FRE 502; preservation of e-discovery; and sanctions issues. Additionally, the panel will discuss effective methods for teaching e-discovery as well as the information the competent young lawyer should learn about e-discovery in law school.

Two years after the adoption of the federal e-discovery amendments as part of the Federal Rules of Civil Procedure, federal litigants have, in the Federal Rules, important guidelines for dealing with electronically stored information (ESI). E-discovery is, nevertheless, still referred to as the "beyond doubt" the "biggest discovery problem" today.¹ Others have emphasized that "[e]-discovery has shaken up litigation across America."² Moreover, attorneys still often fall short in their e-discovery efforts. Indeed, *The National Law Journal* reported in December 2008 that 25% of the reported e-discovery opinions during the first ten months 2008 dealt, at least in part, with sanctions.³

¹ Kevin Clermont, CONCISE HORNBOOKS, PRINCIPLES OF CIVIL PROCEDURE, § 2.2(c), at 64 (West 2d Ed. 2009).

² John M. Barkett, E-DISCOVERY: TWENTY QUESTIONS AND ANSWERS, at ix (American Bar Association 2008).

³ Sheri Qualters, *25% of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, *The National Law Journal*, < <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426790662> > (discussing a recent study by Kroll Ontrack Inc., which analyzed 138 reported opinions).

The Litigation Section panel, which will be led by AALS Litigation Section Chair, Michelle R. Slack, University of Louisville Louis D. Brandeis School of Law, includes the panelists listed below. The panelists will speak on the issues discussed below but will also engage the various e-discovery issues in a general panel discussion and present the following perspectives: the federal rulemaking perspective, the state perspective, the judicial perspective, and the practitioner's perspective.

1. **Richard L. Marcus, University of California, Hastings College of Law.**

Richard Marcus holds the Horace O. Coil Chair in Litigation at UC Hastings in San Francisco. He is co-author of the discovery volumes of the Federal Practice & Procedure Treatise ("Wright & Miller") and of casebooks on Civil Procedure and Complex Litigation. He has also written extensively on E-Discovery, including: *E-Discovery Beyond the Federal Rules*, 37 U. BAL. L. REV. 321 (2008); *E-Discovery and Beyond: Toward Brave New World or 1984?*, 25 REV. LIT. 633 (2006); *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004); *Confronting the Future: Coping With Discovery of Electronic Material*, 64 LAW & COMTEMP. PROBS. 253 (Spring/Summer 2001). Since 1996, Prof. Marcus has served as Special Reporter of the U.S. Judicial Conference Advisory Committee on Civil Rules, focusing particularly on discovery issues. In that capacity, he was a primary drafter of the rule amendments dealing with e-discovery that became effective on December 1, 2006.

Professor Marcus will introduce the program. A primary drafter of the rule amendments dealing with E-Discovery that became effective on December 1, 2006, Professor Marcus will also provide information on the nature and purpose of the federal Rule amendments. He will address issues, including (1) the critical nature of early planning regarding e-discovery, including the advance planning required by the federal e-discovery amendments and required, as a practical matter, to represent a client competently, to ensure proper preservation of ESI, and to prevent sanctions; (2) accessibility of electronically stored information and available search methods; (3) the increasingly important issues of privilege review and potential privilege waiver when the discovery of ESI leads to hundreds of thousands or millions of "relevant" documents; and (4) preservation and sanctions issues regarding ESI.

2. **Barbara L. Major, Magistrate Judge, United States District Court for the Southern District of California, San Diego, California.**

Magistrate Judge Barbara L. Major graduated from Stanford University in 1983 with a Bachelor's of Art degree in Human Biology. In 1987, she received her juris doctorate from The University of California at Berkeley (Boalt Hall). She then clerked for the Honorable J. Lawrence Irving, United States District Court for the Southern District of California, for one year. From 1988 through 1990, Judge Major was an associate at the San Francisco law firm of Bronson, Bronson & McKinnon specializing in product liability litigation. From January 1991 through December 2003, Judge Major was an Assistant United States Attorney in the Southern District of California. During that time, Judge Major prosecuted hundreds of criminal cases, specializing in the prosecution of white collar fraud and intellectual property crimes, computer intrusion crimes, and child pornography and molestation cases. From November 2000 through November 2002, Judge Major was the Chief of the Computer Hacking and Intellectual Property Section (CHIPS). In November 2002, the United States Attorney merged the CHIPS unit into the Major Frauds Section and appointed Judge Major Deputy Chief of the Major Frauds Section. Judge Major became a Magistrate Judge in the Southern District of California in January 2004. Since that time, she has presided over a wide variety of criminal and civil cases. The vast majority of her time is spent conducting settlement conferences, resolving civil discovery disputes, and handling pretrial criminal issues.

Magistrate Judge Major will discuss the growing importance of e-discovery in the litigation process as well as common e-discovery pitfalls. Judge Major also will provide a brief overview of the Federal Rules of Civil Procedure and present a judicial perspective on a range of e-discovery issues, including available sanctions.

3. **Henry S. Noyes, Chapman University School of Law.** Henry Noyes joined the Chapman University School of Law faculty in 2005 after more than a decade as a litigator specializing in complex commercial litigation. He was a partner with Pillsbury Winthrop Shaw Pittman LLP (formerly Pillsbury, Madison & Sutro) in San Francisco and was named a "Northern California Super Lawyer" by Law&Politics and San Francisco Magazine. In addition to his billable practice, he was Pillsbury's pro bono coordinator for the low income legal clinic run by the Bay Area Lawyers Committee for Civil Rights, and he regularly served as an arbitrator in the San Francisco Bar Association's Attorneys' Fees Dispute Program. Professor Noyes teaches and writes about the rules that govern dispute resolution. In 2005, he testified before the U.S. Judicial Conference Advisory Committee on Civil Rules on the proposed e-discovery amendments to the Federal Rules of Civil Procedure. He has written several articles on issues relating to e-discovery, including *Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585 (2005) and *Good Cause Is Bad Medicine for The New E-Discovery Rules*, 21 HARV. J. L. & TECH. 49 (2007), reprinted in full at 248 F.R.D. 1 (2008).

Professor Noyes will present his most recent piece, *Federal Rule of Evidence 502: Stirring The State Law Of Privilege And Professional Responsibility With A Federal Stick*, 66 WASHINGTON & LEE L. REV. (forthcoming 2009), at the Litigation Section program. This piece was selected by the AALS Section on Litigation from a Call for Papers for presentation at the AALS 2009 Annual Meeting. Professor Noyes will provide a brief history of FRE 502 and its purpose and will summarize the main points of the paper, including the question of whether Congress had authority, under the Commerce Clause, to adopt FRE 502. He will then present some hypothetical factual scenarios regarding new FRE 502 that will reveal some of the practical difficulties in dealing with e-discovery and the e-discovery amendments. Among other issues, Professor Noyes will also discuss the growing importance of e-discovery and the requirements of the federal rules.

4. **Bernadette Bollas Genetin, University of Akron School of Law.** Bernadette Bollas Genetin teaches Civil Procedure, Federal Jurisdiction and Procedure, and Complex Litigation at The University of Akron School of Law. A past Chair and Executive Committee member of the AALS Section on Litigation, Professor Genetin writes in the area of federal rulemaking, concentrating on the intersections of federal procedural rules and congressional statutes and on the separation of powers and federalism issues that may result when federal rules and statutes conflict. Professor Genetin has recently turned her focus to the interplay between the federal e-discovery rules and state e-discovery. Professor Genetin received her law degree, with highest honors, from The Ohio State University College of Law, where she also served as Editor in Chief of the Ohio State Law Journal, and she received her undergraduate degree from the University of Notre Dame. Professor Genetin also clerked in the United States Court of Appeals for the Second Circuit.

Professor Genetin will provide the state perspective on e-discovery issues. She will discuss the increasing number of states that have adopted e-discovery rules or legislation. She will conclude that, increasingly, state e-discovery rules parallel, in full or in large part, the federal e-discovery rules. Indeed, most states have patterned state e-discovery rules directly after the federal e-discovery amendments; others have referenced the Conference of Chief Justices' *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* or the National Conference of Commissioners on Uniform State Laws' *Uniform Rules Relating to the Discovery of Electronically Stored Information*, both of which drew extensively from the e-discovery amendments to the Federal Rules. Professor Genetin will also review the extent of variance between federal and state e-discovery rules and suggest that the variances will, in some cases, lead to forum selection based on e-discovery differences, increased discovery costs, and an increased burden on judges.