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04-CV-090

Request to Testify
2/11 DC

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January 18, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington D.C. 20544

**Re: Request to Testify February 11, 2005 Before the
Advisory Committee on Civil Rules on the Proposed
Changes Regarding Electronic Discovery**

Dear Mr. McCabe:

I respectfully request the opportunity to testify before the
Advisory Committee on Civil Rules on February 11, 2005, in
Washington D.C., on the proposed changes regarding electronic
discovery.

The "Digital Evidence Project," which I serve as Chair, is an
interdisciplinary working group of the ABA Section of Science and
Technology Law, and its Information Security Committee. The Project
engages in several activities including publishing; presenting CLE
programs at ABA and other events such as the annual RSA Security
Conference; hosting meetings; and now, conducting surveys on
emerging trends. All this activity relates to the changing nature of our
information infrastructure, particularly how complexity in electronically
stored information is affecting the practice of law.

The Digital Evidence Project Survey

The inaugural survey ("Survey") conducted by the Digital
Evidence Project relates to the instant proposed amendments to the Civil
Rules. The Survey, a paper form of which is attached, together with a
cover letter from Ivan Fong, Chair of the Section, is being conducted by
a nationally recognized market research firm, Target Research Group.
The Survey has a substantial budget. From the outset, our group wanted
the Survey to be distinguished by its *scientific* methodology.
Accordingly, we have involved an expert in survey techniques who has
written extensively on surveys in light of the *Daubert* decision –
Professor Gary T. Ford of American University. Our group has

ABA Midyear Meeting . February 10-12, 2005, Salt Lake City, UT
ABA Annual Meeting . August 4-7, 2005, Chicago, IL



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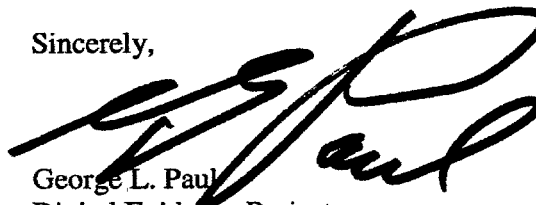
conducted focused interviews of experts in the field, and Professor Ford has used that data to create what we view as a properly conceived survey.

Our target standard for the Survey is that its results would be deemed admissible in U.S. District Court under the *Daubert* line of cases. Accordingly, we propose that if our group is invited to testify, Professor Ford be present to address the Committee, as he can explain the survey methodology. Members of the Digital Evidence Project who can be present at the hearing include not only Professor Ford, but also Mike Prounis and Mike Faraci, who are Subcommittee Co-Chairs for the Survey, and who have electronic discovery experience going back to 1987. We can obviously keep testimony to the time allotted.

Finally, as you know, individual ABA Sections cannot speak on behalf of the ABA without prior approval of the entire House of Delegates, or unless other "blanket" authority is obtained. Accordingly, this testimony does not purport to represent ABA policy. Indeed, our comment does not take the form of an opinion, but rather an attempt to scientifically poll the legal community about the issues and policies underlying the proposed Rules.

We appreciate your consideration.

Sincerely,



George L. Paul
Digital Evidence Project

GLP/edl
Attachments

04252 Digital Evidence Survey
January 14, 2005

To: (Respondent's name or email)
From: ABA Section on Science and Technology Law
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

The proposed amendments could have a significant impact on the discovery of electronically stored information and could thus have a direct effect on your organization. The survey gathers information about your current practices for electronically stored information and your views regarding the proposed amendments.

Target Research Group (TRG), a national survey research firm, has been commissioned to conduct the survey and to compile the results. All respondents are guaranteed anonymity, and your responses will be used only in the aggregate.

Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

If you have any questions about the survey, please contact:

1. George Paul, Chair, Digital Evidence Project, gpaul@lrlaw.com, 602-262-5326;
2. Mike Prounis, Digital Evidence Project, michael.prounis@evidenceexchange.com, 212-594-2501; or
3. Mike Faraci, Digital Evidence Project, mfaraci@NavigantConsulting.com, 202-973-2431

This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery

of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong
Chair, 2004-05
ABA Section of Science & Technology Law

Digital Evidence Questionnaire

Section I - Screening questions

The purpose of these questions is to determine your organization's experience with discovery of electronically stored information.

1. Has your organization been either a defendant or plaintiff in at least one lawsuit that was filed after January 1, 2000?

- Yes → continue
- No → Go to Section V
- Don't know → Go to section V

Definition

For purposes of this survey:

Electronic discovery refers to the discovery of electronically stored information (ESI) including email, word processing documents, spreadsheets, voice mail, and virtually anything that is stored in electronic form on networks, servers, personal computers, floppy discs, hard drives, back-up tapes and other devices.

ESI is used as an acronym for "electronically stored information"

Organization as Plaintiff:

2a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as plaintiff, discovery occurred:

- 0 → go to Q. 3a
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

2b. How many of those lawsuits in which your organization was a plaintiff included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

Organization as defendant:

3a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as defendant, discovery occurred:

0 → go to box before Q4

1-3

4-6

7-10

If more than 10, enter approximate number: _____

Don't know

3b. How many of those lawsuits in which your organization was a defendant included electronic discovery?

0

1-3

4-6

7-10

If more than 10, enter approximate number: _____

Don't know

If "0" to 2a and "0" to 3a go to Section V
If "0" to 2a and "0" to 3b go to Section V
If "0" to 2b and "0" to 3a go to Section V
If "0" to 2b and "0" to 3b go to Section V
If DK to 2a and 2b and 3a and 3b terminate

Section II – Experience with electronic discovery in most recent case

The next series of questions should be answered regarding the most recent experience your organization has had in which electronic discovery occurred.

Definitions of terms used in this section

"Metadata" is information about a particular data set which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Usually, metadata is not visible on the screen but is automatically appended to the file.

"Legacy data" is information is that the organization has stored on software or hardware that has been rendered obsolete or outmoded.

4. Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed?

- Plaintiff
- Defendant
- Both defendant and counter claimant
- Other (please explain)

5a. Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?

- Yes → continue
- No → go to Q6
- Don't know → go to Q6

5b. What was the final result of the pre-discovery meeting(s) regarding electronic discovery?

- The parties agreed on the issues regarding electronic discovery without assistance of Court → Continue
- The parties agreed on the issues regarding electronic discovery with assistance of Court → Continue
- The parties did not agree on the issues regarding electronic discovery and the Court mandated the terms for electronic discovery. → Continue
- Other (please explain) → Continue
- Don't know → Continue

Form of production:

6a. Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; form of production was ordered by court
- No → go to Q7a
- Don't know → go to Q7a

6b. In what form was ESI to be produced? (check all that apply)

- ESI was to produced as paper or hardcopy
- ESI was to produced as TIFF or PDF without corresponding metadata
- ESI was to produced as TIFF or PDF with corresponding metadata
- ESI was to be produced as stored in normal course of business
- ESI was to be produced in searchable form without metadata
- ESI was to be produced in searchable form with metadata
- Other (please describe)
- Don't know

Discovery of email:

7a. Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; email that would be subject to discovery was ordered by court

No

Don't know

→ go to Q8a

→ go to Q8a

7b. What email was subject to discovery? (check all that apply)

Email currently on computer system and/or network

Email that has been deleted

Email stored in backup tapes, discs or servers

Legacy data email stored on obsolete systems

Other (please specify)

Don't know

Preservation of ESI:

8a. Was preservation of ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; ESI subject to preservation was ordered by court

No

Don't know

→ go to Q9a

→ go to Q9a

8b. What ESI was subject to preservation? (check all that apply)

ESI that is currently on the computer system was required to be preserved.

ESI that would be purged from our computer system under normal business practices was required to be preserved

Other (please specify)

Don't know

Protection against waiving privilege:

9a. Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; requirements for claiming privilege for ESI were ordered by court
- No
- Don't know

9b. Did either your organization or the other party inadvertently produce privileged ESI?

- Yes, my organization inadvertently produced privileged ESI
- Yes, the other party inadvertently produced privileged ESI
- Yes, we both inadvertently produced privileged ESI
- No → go to Q10
- Don't know → go to Q10

9c. What was the outcome of inadvertently producing privileged ESI?

- Amicably resolved by parties
- Parties disagreed but did not pursue disagreement with Court
- Court intervened and upheld claim of privilege for ESI
- Court intervened and denied claim of privilege for ESI
- Other (please explain)
- Don't know

10. In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery?

- Pre-discovery meeting(s) reduced cost of discovery of ESI substantially
- Pre-discovery meeting(s) reduced cost of discovery of ESI moderately
- Pre-discovery meeting(s) had no effect on cost of discovery of ESI
- Pre-discovery meeting(s) increased cost of discovery of ESI moderately
- Pre-discovery meeting(s) increased cost of discovery of ESI substantially
- Don't know

Sanctions:

11a. Was the issue of "sanctions" for failure to produce discoverable ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q12a
- Don't know → go to Q12a

11b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party
- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

12a. Was the issue of "sanctions" for spoliation of ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q13a
- Don't know → go to Q13a

12b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party
- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

13a. What was the total amount spent on discovery of any kind in this case?

Write in amount spent on discovery: \$ _____

13b. What was the total amount spent on electronic discovery including amount spent on outside counsel and on outside vendors to help with discovery of ESI?

Write in amount spent on electronic discovery: \$ _____

13c. What percentage of the amount spent on electronic discovery was spent on privilege review before production of ESI?

Percentage of electronic discovery
spent on privilege review of ESI: _____%

13d. What percentage of the amount spent on electronic discovery was spent on outside vendors to assist in discovery of ESI?

Percentage of electronic discovery
spent on outside vendors for discovery of ESI: _____%

14. What was the resolution of this case?

- Case dismissed
- Case settled
- Case still continuing
- Case went to trial
- Case on appeal
- Other (please explain
- Don't know

**Section III – Opinions regarding Proposed
Amendments to Federal Rules of Civil Procedure**

As you may know, the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedures recently published proposed amendments to the Federal Rules of Civil Procedure (FRCP) that affect discovery of electronically stored information. The next set of questions summarize the proposed amendments and ask whether you perceive that the issues raised in the proposed amendments needed addressing.

The complete set of proposed amendments is available at:

www.uscourts.gov/rules/comment2005/CVAug04.pdf

15. Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery?

- I was familiar with all of the proposed amendments
- I was familiar with some of the proposed amendments
- I knew there were proposed amendments but I was not familiar with any
- I did not know there were proposed amendments
- Other (please explain)

16. Please indicate whether you perceive that the issue raised in the proposed amendments "Definitely Needed Addressing" (Def Add), "Probably Needed Addressing" (Prob Add), "Probably Did Not Need Addressing" (Prob Not Add) or "Definitely Did Not Need Addressing" (Def Not Add) by "clicking" on the appropriate response.

16a. Proposed changes to Rule 16.

At present Rule 16 encompass the pretrial scheduling order issued by the court. The proposed amendments to Rule 16 indicate the scheduling order may also address "provisions for the disclosure or discovery of electronically stored information" (ESI) and "adoption of the parties' agreement for protection against waiving privilege."

		Prob	Def	
Def	Prob	Not	Not	Don't
Add	Add	Add	Add	Know

Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"

Amending the FRCP to alert the parties regarding the potential need to adopt provisions against waiving privilege in cases involving electronic discovery.

16b. First set of proposed changes to Rule 26:

At present Rule 26 addresses pretrial "meet and confer" sessions for planning for discovery. The proposed amendments state that pretrial meet and confer sessions include planning for discovery include issues "relating to preserving discoverable information," and "any issues relating to the disclosure or discovery of ESI, including the form in which it should be produced."

Amending the FRCP to alert the parties regarding the potential need to address issues of electronic discovery in meet and confer sessions.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions concerning the preservation of discoverable ESI.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced.

16c. Second proposed change to Rule 26.

The proposed amendments also are concerned with a party's response to a claim of privilege for ESI that was inadvertently produced. After being notified of a claim of privilege, any party who received the privileged ESI "must promptly return sequester, or destroy the specified information and any copies."

Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it.

16d. Third proposed change to Rule 26.

The proposed amendment states that, "A party need not provide discovery of ESI that the party identifies as not reasonably accessible." If the opposing party objects, the party must then show why the ESI is not reasonably accessible and the court may order none, some or all of the ESI be produced.

Amending the FRCP to allow parties to claim and perhaps prove ESI is not

reasonably accessible.

16e. First Proposed change to Rule 34

Rule 34 is concerned with the production and inspection of documents in discovery. The proposed amendments extend discovery to “any designated electronically stored information or any designated documents (... in any medium – from which information can be obtained...)”

Amending the FRCP to require the parties to potentially allow discovery of any designated ESI in any medium.

16f. Second proposed change to Rule 34.

A second proposed change to Rule 34 is concerned with the form of production for ESI. The proposed amendment allows the requestor to specify the form in which ESI is to be produced and allows the responder to provide (a) reason(s) for objecting to the request, such as the information is not reasonably accessible in that form. If the parties cannot agree on the form of production and the Court does not order a form of production, as a last resort, the proposed amendment also requires the information must be supplied in the form in which it is ordinarily maintained or in electronically searchable form. The proposed amendment also states, “The party need only produce such information in one form.”

Amending the FRCP to allow the requestor to specify the form in which the ESI is to be produced.

Amending the FRCP to allow the responder to provide reasons for Objecting to the request for ESI.

Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order.

Amending the FRCP to allow responders To only produce ESI in one form.

16g. Proposed change to Rule 37.

Rule 37 is concerned with failure to make disclosures or cooperate in discovery. The proposed amendments would prevent the Court from imposing sanctions “if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable” and information was lost because “of the routine operation of the party’s electronic information system.” As an alternative to the proposed amendment, it has been suggested that the judge be required to make a finding of

intentionality or recklessness before sanctions can be issued for the destruction of otherwise discoverable ESI.

Amending the FRCP to limit sanctions for Routine purging of computer systems that Results in the destruction of otherwise Discoverable ESI.

Amending the FRCP to limit sanctions for the destruction of otherwise discoverable ESI unless there is a finding of intentionality or recklessness.

Section IV – Opinions Regarding the Affects of Electronic Discovery And the Likely Effects of the Proposed Amendments on Your Organization

17. Please indicate whether you “strongly agree,” “agree,” “disagree” or “strongly disagree” with each of the following statements.

The requirements for electronic discovery have Led to changes in the policies for electronic storage of information at my organization. SA A D SD DK

My organization has decreased the number of days it Keeps ESI on the computer system to reduce the cost of Responding to requests for discovery of ESI. SA A D SD DK

My organization has developed a cost-effective procedure for searching ESI to identify privileged materials. SA A D SD DK

The requirements to preserve electronic information that normally would be purged from our computer system substantially disrupted my organization’s routine business operations. SA A D SD DK

The requirements to preserve electronic information Substantially increased the costs of electronic discovery. SA A D SD DK

My organization settled the case in which electronic discovery was most recently completed to avoid the financial costs of electronic discovery. SA A D SD DK

18. Please indicate whether each of the following types of ESI is “reasonably accessible:”

Information stored on back-up tapes/discs. Yes No DK

Information stored on back-up servers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legacy data stored on obsolete software or hardware.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encrypted information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on handheld devices used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on laptops used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on floppy discs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section V: Descriptive information about you and your organization

Information about your organization:

19a. What type of organization do you work for:

- Private corporation
- Private law firm
- State Government
- Federal Government
- Not-for-profit → go to 19c
- Other (Please specify) _____ → go to 19c

19b. What is the SIC category for your corporation?

- Agriculture, Forestry and Fishing
- Mining
- Construction
- Manufacturing
- Transportation, Communication, Electric, Gas and Sanitary Services
- Wholesale trade
- Retail Trade
- Finance, Insurance and Real Estate
- Business Services
- Professional Services
- Public Administration

19c. What was the approximate total annual revenue of your organization for 2004?

- Less than \$1,000,000
- \$1,000,000 but less than \$10,000,000
- \$10,000,000 but less than \$50,000,000
- \$50,000,000 but less than \$100,000,000
- \$100,000,000 but less than \$500,000,000
- \$500,000,000 but less than \$1,000,000,000
- \$1,000,000,000 but less than \$10,000,000,000
- \$10,000,000,000 or more

19d. Approximately, how many full-time in-house lawyers does your organization employ?

- 1
- 2-5
- 6-10
- 11-20
- 21-50
- 51 or more
- Don't know

Information about you:

20a. How many years has it been since you graduated from law school?

- 1
- 2-5
- 6-10
- 11-20
- 21-30
- 31 or more

20b. What is your current position at your organization?

- Head lawyer at organization
- Senior lawyer supervising other attorneys
- Staff lawyer
- Other (specify)

20c. What is your gender?

- Female
- Male

Thank you for completing this survey.

Please click on the button below to submit.

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VIA FACSIMILE

January 31, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington D.C. 20544

Re: Testimony on February 11, 2005

Dear Mr. McCabe:

Thank you for your letter of January 24. We look forward to seeing you in Washington on February 11.

Your letter asked for our written statement by January 31. You already have the "hard copy" questions of our electronic survey on the issues underlying the proposed amendments – the answers to which we are currently tabulating. The copy of the survey was previously sent to you, as an attachment to our Request to Testify.

And as you know from our earlier letter our statement will, in essence, consist of transmission of the results of our survey.

We are still in the process of analyzing the data, and will be busy with that job for the next week or so, as well as with writing the Report of Results, all so that we can be fully prepared by February 11.

Our statement on February 11 will consist of the following:

1. Summary of the Major Findings of Survey, with written materials
2. Explanation of Survey Methodology
3. Response to Questions About Survey Methodology

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We therefore sincerely hope the Committee will grant us additional time to get you the written aspect of our testimony, styled "Report on the Digital Evidence Project Survey on Electronically Stored Information," and that this will not overly inconvenience the Panel.

If this does present a problem, we respectfully request a chance to discuss the issue.

Finally, it is an honor to be allowed to testify and we look forward to seeing you in person.

Sincerely,

George Paul
Digital Evidence Project

GLP/edl

04252 Digital Evidence Survey
January 14, 2005

To: (Respondent's name or email)
From: ABA Section on Science and Technology Law
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

The proposed amendments could have a significant impact on the discovery of electronically stored information and could thus have a direct effect on your organization. The survey gathers information about your current practices for electronically stored information and your views regarding the proposed amendments.

Target Research Group (TRG), a national survey research firm, has been commissioned to conduct the survey and to compile the results. All respondents are guaranteed anonymity, and your responses will be used only in the aggregate.

Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

If you have any questions about the survey, please contact:

1. George Paul, Chair, Digital Evidence Project, gpaul@lrlaw.com, 602-262-5326;
2. Mike Prounis, Digital Evidence Project, michael.prounis@evidenceexchange.com, 212-594-2501; or
3. Mike Faraci, Digital Evidence Project, mfaraci@NavigantConsulting.com, 202-973-2431

This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery

of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong
Chair, 2004-05
ABA Section of Science & Technology Law

Digital Evidence Questionnaire

Section I - Screening questions

The purpose of these questions is to determine your organization's experience with discovery of electronically stored information.

1. Has your organization been either a defendant or plaintiff in at least one lawsuit that was filed after January 1, 2000?

- Yes → continue
- No → Go to Section V
- Don't know → Go to section V

Definition

For purposes of this survey:

Electronic discovery refers to the discovery of electronically stored information (ESI) including email, word processing documents, spreadsheets, voice mail, and virtually anything that is stored in electronic form on networks, servers, personal computers, floppy discs, hard drives, back-up tapes and other devices.

ESI is used as an acronym for "electronically stored information"

Organization as Plaintiff:

2a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as plaintiff, discovery occurred:

- 0 → go to Q. 3a
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

2b. How many of those lawsuits in which your organization was a plaintiff included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

Organization as defendant:

3a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as defendant, discovery occurred:

- 0 → go to box before Q4
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

3b. How many of those lawsuits in which your organization was a defendant included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

If "0" to 2a and "0" to 3a go to Section V
If "0" to 2a and "0" to 3b go to Section V
If "0" to 2b and "0" to 3a go to Section V
If "0" to 2b and "0" to 3b go to Section V
If DK to 2a and 2b and 3a and 3b terminate

Section II – Experience with electronic discovery in most recent case

The next series of questions should be answered regarding the most recent experience your organization has had in which electronic discovery occurred.

Definitions of terms used in this section

"Metadata" is information about a particular data set which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Usually, metadata is not visible on the screen but is automatically appended to the file.

"Legacy data" is information is that the organization has stored on software or hardware that has been rendered obsolete or outmoded.

4. Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed?

- Plaintiff
- Defendant
- Both defendant and counter claimant
- Other (please explain)

5a. Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?

- Yes → continue
- No → go to Q6
- Don't know → go to Q6

5b. What was the final result of the pre-discovery meeting(s) regarding electronic discovery?

- The parties agreed on the issues regarding electronic discovery without assistance of Court → Continue
- The parties agreed on the issues regarding electronic discovery with assistance of Court → Continue
- The parties did not agree on the issues regarding electronic discovery and the Court mandated the terms for electronic discovery. → Continue
- Other (please explain) → Continue
- Don't know → Continue

Form of production:

6a. Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; form of production was ordered by court
- No → go to Q7a
- Don't know → go to Q7a

6b. In what form was ESI to be produced? (check all that apply)

- ESI was to be produced as paper or hardcopy
- ESI was to be produced as TIFF or PDF without corresponding metadata
- ESI was to be produced as TIFF or PDF with corresponding metadata
- ESI was to be produced as stored in normal course of business
- ESI was to be produced in searchable form without metadata
- ESI was to be produced in searchable form with metadata
- Other (please describe)
- Don't know

Discovery of email:

7a. Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; email that would be subject to discovery was ordered by court

No

Don't know

→ go to Q8a

→ go to Q8a

7b. What email was subject to discovery? (check all that apply)

Email currently on computer system and/or network

Email that has been deleted

Email stored in backup tapes, discs or servers

Legacy data email stored on obsolete systems

Other (please specify)

Don't know

Preservation of ESI:

8a. Was preservation of ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; ESI subject to preservation was ordered by court

No

Don't know

→ go to Q9a

→ go to Q9a

8b. What ESI was subject to preservation? (check all that apply)

ESI that is currently on the computer system was required to be preserved.

ESI that would be purged from our computer system under normal business practices was required to be preserved

Other (please specify)

Don't know

Protection against waiving privilege:

9a. Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; requirements for claiming privilege for ESI were ordered by court
- No
- Don't know

9b. Did either your organization or the other party inadvertently produce privileged ESI?

- Yes, my organization inadvertently produced privileged ESI
- Yes, the other party inadvertently produced privileged ESI
- Yes, we both inadvertently produced privileged ESI
- No → go to Q10
- Don't know → go to Q10

9c. What was the outcome of inadvertently producing privileged ESI?

- Amicably resolved by parties
- Parties disagreed but did not pursue disagreement with Court
- Court intervened and upheld claim of privilege for ESI
- Court intervened and denied claim of privilege for ESI
- Other (please explain)
- Don't know

10. In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery?

- Pre-discovery meeting(s) reduced cost of discovery of ESI substantially
- Pre-discovery meeting(s) reduced cost of discovery of ESI moderately
- Pre-discovery meeting(s) had no effect on cost of discovery of ESI
- Pre-discovery meeting(s) increased cost of discovery of ESI moderately
- Pre-discovery meeting(s) increased cost of discovery of ESI substantially
- Don't know

Sanctions:

11a. Was the issue of "sanctions" for failure to produce discoverable ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q12a
- Don't know → go to Q12a

11b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party
- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

12a. Was the issue of "sanctions" for spoliation of ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q13a
- Don't know → go to Q13a

12b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party
- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

13a. What was the total amount spent on discovery of any kind in this case?

Write in amount spent on discovery: \$ _____

13b. What was the total amount spent on electronic discovery including amount spent on outside counsel and on outside vendors to help with discovery of ESI?

Write in amount spent on electronic discovery: \$ _____

13c. What percentage of the amount spent on electronic discovery was spent on privilege review before production of ESI?

Percentage of electronic discovery
spent on privilege review of ESI: _____%

13d. What percentage of the amount spent on electronic discovery was spent on outside vendors to assist in discovery of ESI?

Percentage of electronic discovery
spent on outside vendors for discovery of ESI: _____%

14. What was the resolution of this case?

- Case dismissed
- Case settled
- Case still continuing
- Case went to trial
- Case on appeal
- Other (please explain)
- Don't know

**Section III – Opinions regarding Proposed
Amendments to Federal Rules of Civil Procedure**

As you may know, the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedures recently published proposed amendments to the Federal Rules of Civil Procedure (FRCP) that affect discovery of electronically stored information. The next set of questions summarize the proposed amendments and ask whether you perceive that the issues raised in the proposed amendments needed addressing.

The complete set of proposed amendments is available at:

www.uscourts.gov/rules/comment2005/CVAug04.pdf

15. Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery?

- I was familiar with all of the proposed amendments
- I was familiar with some of the proposed amendments
- I knew there were proposed amendments but I was not familiar with any
- I did not know there were proposed amendments
- Other (please explain)

16. Please indicate whether you perceive that the issue raised in the proposed amendments "Definitely Needed Addressing" (Def Add), "Probably Needed Addressing" (Prob Add), "Probably Did Not Need Addressing" (Prob Not Add) or "Definitely Did Not Need Addressing" (Def Not Add) by "clicking" on the appropriate response.

16a. Proposed changes to Rule 16.

At present Rule 16 encompasses the pretrial scheduling order issued by the court. The proposed amendments to Rule 16 indicate the scheduling order may also address "provisions for the disclosure or discovery of electronically stored information" (ESI) and "adoption of the parties' agreement for protection against waiving privilege."

		Prob	Def	
Def	Prob	Not	Not	Don't
Add	Add	Add	Add	Know

Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"

Amending the FRCP to alert the parties regarding the potential need to adopt provisions against waiving privilege in cases involving electronic discovery.

16b. First set of proposed changes to Rule 26:

At present Rule 26 addresses pretrial "meet and confer" sessions for planning for discovery. The proposed amendments state that pretrial meet and confer sessions include planning for discovery include issues "relating to preserving discoverable information," and "any issues relating to the disclosure or discovery of ESI, including the form in which it should be produced."

Amending the FRCP to alert the parties regarding the potential need to address issues of electronic discovery in meet and confer sessions.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions concerning the preservation of discoverable ESI.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced.

16c. Second proposed change to Rule 26.

The proposed amendments also are concerned with a party's response to a claim of privilege for ESI that was inadvertently produced. After being notified of a claim of privilege, any party who received the privileged ESI "must promptly return sequester, or destroy the specified information and any copies."

Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it.

16d. Third proposed change to Rule 26.

The proposed amendment states that, "A party need not provide discovery of ESI that the party identifies as not reasonably accessible." If the opposing party objects, the party must then show why the ESI is not reasonably accessible and the court may order none, some or all of the ESI be produced.

Amending the FRCP to allow parties to claim and perhaps prove ESI is not

reasonably accessible.

16e. First Proposed change to Rule 34

Rule 34 is concerned with the production and inspection of documents in discovery. The proposed amendments extend discovery to "any designated electronically stored information or any designated documents (... in any medium – from which information can be obtained...)."

Amending the FRCP to require the parties to potentially allow discovery of any designated ESI in any medium.

16f. Second proposed change to Rule 34.

A second proposed change to Rule 34 is concerned with the form of production for ESI. The proposed amendment allows the requestor to specify the form in which ESI is to be produced and allows the responder to provide (a) reason(s) for objecting to the request, such as the information is not reasonably accessible in that form. If the parties cannot agree on the form of production and the Court does not order a form of production, as a last resort, the proposed amendment also requires the information must be supplied in the form in which it is ordinarily maintained or in electronically searchable form. The proposed amendment also states, "The party need only produce such information in one form."

Amending the FRCP to allow the requestor to specify the form in which the ESI is to be produced.

Amending the FRCP to allow the responder to provide reasons for Objecting to the request for ESI.

Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order.

Amending the FRCP to allow responders To only produce ESI in one form.

16g. Proposed change to Rule 37.

Rule 37 is concerned with failure to make disclosures or cooperate in discovery. The proposed amendments would prevent the Court from imposing sanctions "if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable" and information was lost because "of the routine operation of the party's electronic information system." As an alternative to the proposed amendment, it has been suggested that the judge be required to make a finding of

intentionality or recklessness before sanctions can be issued for the destruction of otherwise discoverable ESI.

Amending the FRCP to limit sanctions for Routine purging of computer systems that Results in the destruction of otherwise Discoverable ESI.

Amending the FRCP to limit sanctions for the destruction of otherwise discoverable ESI unless there is a finding of intentionality or recklessness.

**Section IV – Opinions Regarding the Affects of Electronic Discovery
And the Likely Effects of the Proposed Amendments on Your Organization**

17. Please indicate whether you “strongly agree,” “agree,” “disagree” or “strongly disagree” with each of the following statements.

The requirements for electronic discovery have Led to changes in the policies for electronic storage of information at my organization. SA A D SD DK

My organization has decreased the number of days it Keeps ESI on the computer system to reduce the cost of Responding to requests for discovery of ESI. SA A D SD DK

My organization has developed a cost-effective procedure for searching ESI to identify privileged materials. SA A D SD DK

The requirements to preserve electronic information that normally would be purged from our computer system substantially disrupted my organization’s routine business operations. SA A D SD DK

The requirements to preserve electronic information Substantially increased the costs of electronic discovery. SA A D SD DK

My organization settled the case in which electronic discovery was most recently completed to avoid the financial costs of electronic discovery. SA A D SD DK

18. Please indicate whether each of the following types of ESI is “reasonably accessible:”

Information stored on back-up tapes/discs. Yes No DK

Information stored on back-up servers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legacy data stored on obsolete software or hardware.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encrypted information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on handheld devices used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on laptops used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on floppy discs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section V: Descriptive information about you and your organization

Information about your organization:

19a. What type of organization do you work for:

- Private corporation
- Private law firm
- State Government
- Federal Government
- Not-for-profit
- Other (Please specify) _____ → go to 19c
- go to 19c

19b. What is the SIC category for your corporation?

- Agriculture, Forestry and Fishing
- Mining
- Construction
- Manufacturing
- Transportation, Communication, Electric, Gas and Sanitary Services
- Wholesale trade
- Retail Trade
- Finance, Insurance and Real Estate
- Business Services
- Professional Services
- Public Administration

19c. What was the approximate total annual revenue of your organization for 2004?

- Less than \$1,000,000
- \$1,000,000 but less than \$10,000,000
- \$10,000,000 but less than \$50,000,000
- \$50,000,000 but less than \$100,000,000
- \$100,000,000 but less than \$500,000,000
- \$500,000,000 but less than \$1,000,000,000
- \$1,000,000,000 but less than \$10,000,000,000
- \$10,000,000,000 or more

19d. Approximately, how many full-time in-house lawyers does your organization employ?

- 1
- 2-5
- 6-10
- 11-20
- 21-50
- 51 or more
- Don't know

Information about you:

20a. How many years has it been since you graduated from law school?

- 1
- 2-5
- 6-10
- 11-20
- 21-30
- 31 or more

20b. What is your current position at your organization?

- Head lawyer at organization
- Senior lawyer supervising other attorneys
- Staff lawyer
- Other (specify)

20c. What is your gender?

- Female
- Male

Thank you for completing this survey.

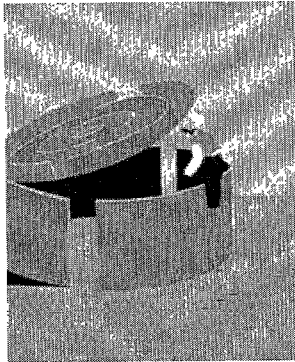
Please click on the button below to submit.

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04-CV-090
Final Testimony 2/11 DC
of
George Paul

**ABA Digital Evidence Project
Survey On Electronic Discovery
Trends and Proposed
Amendments To The Federal
Rules of Civil Procedure**

Preliminary Report



February 2005

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BACKGROUND AND OBJECTIVES

The Digital Evidence Project is an interdisciplinary working group of the ABA Section of Science & Technology Law, and its Information Security Committee. The project engages in activities including publishing, presenting CLE programs and conducting survey research on emerging trends. All of this activity relates to the changing nature of our information infrastructure, particularly how complexity in electronically stored information ("ESI") is affecting the practice of law.

The Digital Evidence Project's Survey Subcommittee determined in mid-2004 to do a survey on recent trends in storage and discovery of ESI. The survey (hereafter "Survey") was then expanded to encompass certain proposed amendments to the Federal Rules of Civil Procedure, relating to the discovery and production of ESI. The Survey Subcommittee was headed by George Paul, Michael Prounis and Michael Faraci, all of the Digital Evidence Project. In addition, the Survey was funded by organizations with which those individuals are associated: Lewis and Roca, LLC; Evidence Exchange; and Navigant Consulting, Inc.

The Survey was designed to ascertain corporate counsel's opinions about recent trends in data management, electronic discovery and the proposed changes in the Federal Rules. The nation's corporate counsel obviously help set policy and meet challenges at organizations which are the primary "owners" of ESI. They are significant users of legal services, and, of course, their organizations will be affected by any changes in the Federal Rules. The Survey Subcommittee noted that the rule drafters, although receiving robust communication from organized groups, perhaps had not received input from the "unorganized" rank and file of the nation's corporate counsel, most of which readily admit they are not familiar with the existence of and/or details of the proposed rule amendments. There was also a concern that little survey evidence, as opposed to anecdotal evidence, was being made available at conferences. Finally, there was the fact that the rule drafters necessarily had to otherwise rely on dated survey data, including the 2000 ABA Litigation Section Survey, the 2000 Survey of Magistrate Judges, and Cohasset Associates' 1999, 2001 and 2003 Surveys of Records Management Professionals (Co-sponsored in 2003 by ARMA International and AIM International).

The Digital Evidence Project wanted a scientific methodology. It followed the procedures and principles of "The Reference Guide on Survey Research," published in the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000). It sought the involvement of an acknowledged expert in survey technique. A nationally recognized market research firm, Target Research Group, conducted the survey interviews in accordance with best industry standards.

While our conclusions support many earlier results, the Survey offers a new perspective on the assumptions and policies underlying the proposed rule amendments. The population surveyed included a broad cross-section of highly experienced corporate counsel, who by a significant majority run legal departments, or supervise lawyers in multi-billion dollar enterprises. The findings are surprising in some respects, but largely are interpreted to be supportive of the rule makers' apparent strategies for dealing with the challenges posed by ESI. The results are reflective of a profession which is in a period of transition. The results also provide insight as to the degree of change, particularly as to a new approach of "collaboration" by advocates, that will be required to evolve to the world envisioned by the proposed rule amendments.

The Survey had three principal objectives:

- 1) To ascertain the extent to which electronically stored information, (sometimes "ESI" or digital evidence), is occurring as evidence in cases filed since 2000;
- 2) To determine Respondents' experience with the process of discovery of ESI and the types of evidence which were subject to discovery; and
- 3) To ascertain corporate counsel's familiarity with and opinions about the policies underlying proposed changes in the Federal Rules of Civil Procedure (FRCP).

METHODOLOGY

The Survey was conducted over the Internet from a sample of lawyers listed in the Directory of Corporate Counsel. The details of the questionnaire design process, population, sample and the survey response rate are summarized below.

Exploratory Research. To ensure that the Survey questionnaire investigated important issues, "focused interviews" were conducted with individuals who were both experts in electronic discovery and very familiar with the proposed rules changes. The focused interviews continued until responses from the experts became redundant.

Questionnaire design. The final Survey questionnaire was designed by Gary T. Ford, Professor of Marketing, Kogod School of Business, American University. Professor Ford has designed and interpreted numerous surveys and social science experiments in both academic and litigation settings, and has written on surveys in light of the *Daubert* line of cases.¹

The final survey covered five major topics:

- 1) The number of times the Respondent's organization had been either a plaintiff or defendant in litigation since 2000 and the number of times electronic discovery had occurred in those cases;
- 2) A description of the process under which electronic discovery was conducted and the types of digital evidence that were subject to discovery in the most recent case;
- 3) The total and relative costs of electronic discovery;
- 4) Respondent's familiarity with and opinions regarding the policies underlying the proposed amendments to the FRCP; and
- 5) Descriptive information regarding Respondent (e.g., years since graduating from law school, current position) and his or her organizations (e.g., annual sales, SIC category).

The complete Survey took approximately 20 minutes to complete. A copy of the email invitation to participate in the Survey and the entire Survey itself are included in Appendix B of this report.

Survey population and sample. The appropriate population for the survey consisted of corporate counsel throughout the United States. The mailing list used to generate the sample for that population was drawn from the July 30, 2004 Directory of Corporate Counsel issued by Aspen Publishers, which is a list of over 20,000 corporate counsel from over 9000 companies throughout the United States and Canada.

After removing respondents from outside the United States and for whom no email address was available, the resulting available sample consisted of approximately 12,000 corporate counsel.

An email cover letter from Ivan K. Fong, the current Chair of the ABA's Section of Science & Technology Law, was sent to an initial sample of 4,000. The cover letter stressed the importance of the survey and offered respondents the opportunity to receive a summary of the final report. When the initial response to the email solicitation was below expectations, the sample to whom mailings were sent was expanded to the entire list of 12,000 potential

¹Professor Ford's curriculum vitae is in Appendix C.

respondents. A \$10.00 donation to the American Red Cross Tsunami Fund was also offered for each completed interview. Two follow-up mailings were also sent encouraging attorneys to respond.

Each email had a unique link to the survey, which had a unique ID# appended to the link, which allowed it to enter the website survey. This methodology prevented duplicate surveys. Once at the survey site, the respondent was allowed to suspend the survey at any point and return to that point upon re-entering the survey. The surveys were conducted from January 18 – February 1, 2005.

A total of 11,677 emails were sent out to corporate counsel throughout the United States. A total of 1,815 emails were returned because of an incorrect email address, leaving a beginning sample of 9,862. Of these, 326 individuals returned surveys. The 326 surveys included 267 from respondents whose organizations had either been either a plaintiff or defendant in a lawsuit filed since the year 2,000. Responses were received from an additional 59 respondents whose organization had not been involved in a lawsuit since 2,000. The survey response rate can be estimated at 3.30% which is quite low.

When there is a low response rate to a survey, the researcher must be concerned about the possibility of non-response bias, i.e., that the respondents are different from non-respondents in some way. One way to estimate the non-response bias would to send a sample of non-respondents a very abbreviated version of the survey to determine whether they differ from respondents in terms of years or experience, size of organizations, number of lawsuits and other similar variables. That approach is being considered but has not implemented due to time constraints.

As is discussed below, the ending sample consists predominantly of experienced attorneys in senior positions at large and small companies.

The results of the Survey are tabulated in Appendix A.

PRELIMINARY RESEARCH FINDINGS

Characteristics of Respondents

The Respondents are highly experienced attorneys, who by a significant majority (i.e., 65.5%), either run (Head Lawyer at Organization) or supervise (Senior lawyer supervising other lawyers) corporate legal departments. The majority of their organizations are multibillion-dollar entities, with a substantial percentage of the remainder having revenues in the hundreds of millions of dollars. The majority of Respondents have over 21 years of practice experience. 90.3% of Respondents have been involved as Defendants in post-2000 lawsuits; while 74.9% have been involved as Plaintiffs. As Defendants, 99.3% of Respondents who knew about the status of ESI had experienced electronic discovery in their cases, constituting 79% of the total Respondent population. Substantial numbers of Respondents have also dealt with Electronic Discovery issues as Plaintiffs.

For detailed information about the characteristics of Respondents, please refer to Tables 2, 3, 4, 5, 56, 57, 58, 59, 60, and 61 of Appendix A.

Table 61

Respondents' Current position in organization:

Current Position	Results	% of Total
Head lawyer at organization	69	25.8%
Senior lawyer Supervising other attorneys	106	39.7%
Staff Lawyer	80	30.0%
Other	12	4.5%
Total	267	100.0%

Characteristics of Responding Organizations

74.5% of Respondents work for private corporations; 16.5% work for Not-For-Profits or State Governments. One-third of these organizations specialize in manufacturing; 20% specialize in finance, insurance and real estate; and 14% specialize in transportation, communications, electric, gas and sanitary services. Another 10% specialize in professional services (i.e., non-law firms). The responding organizations appear relatively large: 61 Respondents were from organizations with annual revenues larger than \$10 billion, with 90 Respondents from organizations larger than \$1 billion but less than \$10 billion. Only 13.4% of the Respondents were from organizations with revenues of less than \$50 Million.

Table 58

Total Revenue of your organization in 2004:

Revenue	Results	% of Total
Less than \$1,000,000	3	1.1%
\$1,000,000 - \$9,999,999	14	5.2%
\$10,000,000 - \$49,999,999	19	7.1%
\$50,000,000 - \$999,999,999	12	4.5%
\$100,000,000 - \$499,999,999	32	12.0%
\$500,000,000 - \$999,999,999	36	13.5%
\$1,000,000,000 - \$9,999,999,999	90	33.7%
\$10,000,000,000 +	61	22.8%
Total	267	100.0%

Meet and Confer Sessions

The Survey requested detailed information about the Respondent's most recent case involving ESI.

The results revealed that pre-discovery meetings about electronic discovery issues happened only in a minority of the most recent cases. The practice of "meet and confer" sessions – although happening to some extent – is still not a majority practice as it relates to ESI. We are in a period of transition.

For example, in their most recent case involving electronic evidence, only 25.5% of the Respondents indicated they had had a "meeting or meetings" with opposing counsel for the purpose of developing the parameters of electronic discovery. Similarly, only a minority discussed the following issues: protection against inadvertent production of privileged ESI (19.5%); the form of ESI to be produced (30%); production of e-mail (32.6%); or preservation of ESI (29.6%).

But another trend, that of cooperation and ability to agree, was apparent inside the larger trend reflecting infrequency of conferences. Those parties that did engage in pre-discovery "meet and confer" sessions largely were able to work through ESI issues amicably, or at least without the need for a court-mandated solution. Of the Respondents who knew about the ability to agree in pre-discovery meetings, which statistic must be derived from Table 8, 82.4% either agreed on the issues without the assistance of the court (57.8%), or agreed with the assistance of the court, but without any court-mandated solution (24.6%). Only 17.5% of the Respondents who knew the status of ability to agree (a mere 3.7% of those queried) indicated the parties were unable to agree on electronic discovery issues, and the court was necessary to mandate the terms. This shows an ability to work through emerging issues without the need for court-mandated solutions.

Similarly, of those Respondents who indicated that the form of production was a topic of pre-discovery meetings, 75% were able to agree on the form of production without assistance of

the court, and 15% were able to reach agreement with assistance of the court, making the total of those who were able to agree without a court-mandated solution an overwhelming 90%. Only 10% of the Respondents indicated that a form of production was ordered by the court.

Yet again, only 16.1% of the Respondents indicated that a court order was necessary to resolve issues about discovery of e-mail.

Regarding the issue of “preservation” of ESI, 92.4% of those who indicated that preservation was a topic of pre-discovery meetings reported they were able to agree without any assistance of the court (75.9%), or were able to agree with the assistance of the court (16.5%). Only 7.6% of the Respondents reported that the issue of preservation was decided by the court.

Finally, concerning the topic of privilege waiver, the Respondents reported a marked ability to agree about the issue without the court. Only 3.8% of the Respondents who had discussed this issue indicated that solutions were ordered by the court. 76.9% of the Respondents indicated that they were able to reach agreement on inadvertent privilege waiver without any court intervention, while 19.2% were still able to agree, but with some perceived assistance from the court.

About 44% of the Respondents had an opinion on whether pre-discovery meetings covering ESI issues had an effect on the cost of discovery. Of those with opinions, 53.3% felt that pre-discovery meetings reduced costs substantially or moderately. 39.2% believed there was no effect on cost. And 7.5% believed that costs were either increased moderately (5.8%), or substantially (1.7%).

Accordingly, although meet-and-confer/pre-discovery meetings currently happen only in a minority of cases, there is a trend that when conferences do occur, parties are generally able to agree about the issues without court orders.

For detailed information about pre-discovery meetings, please refer to Tables 7, 8, 9, 11, 13, 15, 18 in Appendix A.

Table 7

“Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?”

	Results	% of Total
Yes	68	25.5%
No	141	52.8%
Don't know	58	21.7%
Total	267	100.0%

Most Recent Experience – Form of Production

On their most recent case involving Electronic Discovery (where form of production was an issue and Respondents knew about such form):

46.3% of Respondents reported they agreed to produce ESI as paper.

30.0% of Respondents reported they agreed to produce ESI as "native" (i.e., as stored in the ordinary course of business)

20.0% of Respondents reported they agreed to produce ESI as TIFF or non-searchable PDF with metadata

18.8% of Respondents reported they agreed to produce ESI as TIFF or non-searchable PDF without metadata

10% of Respondents reported they agreed to produce ESI in a searchable form (e.g., fat PDF) with metadata

15% of Respondents reported they agreed to produce ESI in a searchable form without metadata

Based upon the above result, it appears that parties agreed in many instances to multiple production formats (e.g., possibly paper and possibly native for files such as spreadsheets and databases). To a large extent, parties are still transmuting information stored in electronic media to the time honored "paper" form of writing, in the context of discovery of information. However, "native" and other electronic formats are also now used substantially.

For detailed information about form of production in the most recent case, please see Tables 9 and 10 in Appendix A.

Experience with Privilege Waiver Issues

The Survey revealed that inadvertent production of privileged ESI is a real world concern, not a hypothetical possibility. Respondents did report that either their organization, or the opponent, or both, had inadvertently produced privileged ESI.

But parties seemed to be able to deal with the issue amicably. As noted above, when privilege waiver was the issue of a pre-discovery meeting, 76.9% of the Respondents indicated they were able to reach an agreement without assistance of any kind from the court. The ability to agree, however, seems to have been impeded somewhat when following an actual inadvertent production. Of those reporting an actual inadvertent production of privileged material, 43.8% were able to resolve the issue amicably. 25% disagreed but did not pursue the disagreement with the court. In the very few instances where a court was called on to rule whether there had been a waiver, the court upheld the claim of privilege on a 5-to-1 ratio as compared to ruling there had been a waiver, which was reported as occurring by only one Respondent.

These results support the proposed amendments' approach to "claw-back" and "sneak-peak" provisions. Inadvertent production of privileged ESI does occur. Dealing with the issue up front can produce consensual resolution. Dealing with the issue after inadvertent production can still lead to amicable solutions, but disagreement occurred more frequently.

For detailed information on privilege waiver issues, please see Tables 16, 17 of Appendix A.

Threat of Sanctions Over Spoliation of ESI

Although concern for sanctions was evident as shown in the Survey's Tables 41 and 42, with high support for safe harbor and heightened proof requirements, the actual experience of the Respondents did not show that either the threat of sanctions, or the imposition of sanctions, was prevalent.

For example, only 4.9% of Respondents indicated that the opposing party had requested the Respondent's side be sanctioned for spoliation of ESI. 2.2% indicated that indeed it was the Respondent which had requested spoliation sanctions, and 1.5% indicated that each side had requested sanctions of the other, making a total of 8.6% of all Respondents having some experience with a request for sanctions. The vast majority, 91.4%, either did not have any experience with sanctions regarding spoliation in their most recent case, or simply didn't know.

Sanctions for spoliation appear even more rare when one discusses the actual sanctioning of a litigant. Only 1 opposing party (0.4%) was sanctioned for spoliation, and no Respondents were sanctioned. The Court threatened to sanction parties on 4 occasions (17.4%). But even in the cases where sanctions for spoliation became an issue, sanctions were the minority outcome, happening only once in the totality of the Survey.

For detailed information about sanctions for spoliation, please refer to Tables 21 and 22 of the Appendix.

Changes in Data Management Policies

69.3% of Respondents indicate that requirements for electronically stored information have led to changes in their organization's records management policies. 18.7% report no impact on Records Management policy development. However, a slight majority of Respondents have not reduced the number of days in which ESI is stored to reduce Electronic Discovery costs, so we can assume that the size and volume of Respondent's archives continues to grow, at least in the majority of organizations.

Table 43

Agreement rating with each of the following statements:
"The requirements for electronic discovery have led to changes in the policies for electronic storage of information at my organization"

	Results	% of Total
Strongly Agree	73	27.3%
Agree	112	41.9%
Disagree	42	15.7%
Strongly Disagree	8	3.0%
Don't Know	32	12.0%
Total	267	100.0%

Table 44

Agreement rating with each of the following statements:
“My organization has decreased the number of days it keeps ESI on the computer system to reduce the cost of responding to requests for discovery of ESI”

	Results	% of Total
Strongly Agree	20	7.5%
Agree	52	19.5%
Disagree	112	41.9%
Strongly Disagree	30	11.2%
Don't Know	53	19.9%
Total	267	100.0%

Lack of Electronic Discovery Tools

66.3% of Respondents report that their Organizations do not have cost-effective procedures for searching ESI to identify privileged materials. Some of the Repondents felt quite strongly about this, as 20.6% “strongly disagreed” with the assertion that their organization had developed cost effective procedures for searching ESI to identify privileged materials. Conversely, only 1.5% of the Repondents “strongly agreed” that their organization had developed cost effective procedures. Not surprisingly, as discussed above, some Respondents reported that in their most recent case, their organizations or their opponents inadvertently produced privileged ESI.

Please refer to Table 45 for information about lack of cost effective procedures.

ESI and Its Impact on Settlement of Disputes

As reported in Table 48, 69.7% of the Respondents did not agree with the proposition that their organization settled the most recent case to avoid the financial costs of electronic discovery. Only 3% of Repondents strongly agreed with this statement, and only a total of 10.5% agreed with it to any extent.

This significant finding reveals that, at least among the responding organizations, there is not an overwhelming dynamic on settlement arising from the financial costs of electronic discovery.

Support for Rules Reform

A significant result of the Survey was that the proposed amendments are relatively unknown among corporate law departments. Many Respondents were unfamiliar with the proposed rules. Only 7.1% of the Respondents indicated they were familiar with “all the proposed amendments,” with another 10.5% indicating familiarity with some of the proposed amendments.

Indeed, more than one-third (33.7%) of the Respondents indicated they did not know of the existence of the proposed amendments. Another 48.7% indicated they knew there were

proposed amendments, but were not familiar with any – making the total of those who were either ignorant of or unfamiliar with the proposed rules amendments a significant 82.3%.

The Survey was designed, however, with the assumption that the proposed amendments would not necessarily be familiar to Respondents. The designers wanted to gauge reactions to the issues relevant to the proposed rules changes, even in the absence of pre-existing knowledge of the rules.

Generally, Respondents were in agreement with the rules' apparent policies of focusing party and advocate attention on ESI issues, and providing a framework for attempted collaboration before court intervention.

Some of such agreement with the rules' apparent policies are discussed below:

FRCP Rule 16. 78.7% of the Respondents felt that amending the FRCP to alert parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI" needed addressing by rule makers.

FRCP Rule 26. 81.6% of the Respondents believed that there was a need for procedures to handle the inadvertent production of privileged ESI (48.3% "definitely needed addressing" and 33.3% "probably needed addressing").

FRCP Rule 26. 89.1% of the Respondents believed there was a need for the ability to claim and prove that ESI was "not reasonably accessible" (59.6% "definitely needed addressing" and 29.6% "probably needed addressing").

FRCP Rule 34. 82% of the Respondents believed there was a need to allow the responder to provide reasons for objecting to a request for ESI (48.3% "definitely needed addressing" and 33.7% "probably needed addressing").

FRCP Rule 37. 87.6% of the Respondents believed that there was a need to limit sanctions for the destruction of ESI unless there was a finding of intentionality or recklessness (59.2% "definitely needed addressing" and 28.5% "probably needed addressing"). Only 2.6% felt that this area "definitely did not need addressing" and only 4.5% felt the area "probably did not need addressing."

FRCP Rule 37. 88% of the Respondents believed that limiting sanctions in the context of routine purging of computer systems was needed (63.7% "definitely needed addressing" and 24.3% "probably needed addressing"). Only 2.2% felt that this area "definitely did not need addressing" and only 5.2% felt that the area "probably did not need addressing."

The opinions of the Respondents about the apparent policies underlying the proposed amendments are in found in Tables 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42 of Appendix A.

Incipient Confusion About "Reasonable Accessibility"

The Survey did reveal an area of incipient confusion. Respondents were asked for their impressions of what type of media or storage elements were reasonably accessible or inaccessible.

Contrary to anticipated response, 59.6% of the Respondents believed that information stored on back-up tapes/discs was "reasonably accessible."

And in conjunction with anticipated response, only 7.9% of the Respondents believed that legacy information stored on obsolete software or hardware was "reasonably accessible."

40.8% of the Respondents "didn't know" whether encrypted information was "reasonably accessible," with those who did express an opinion divided 36.7% in favor of reasonable accessibility, and 63.3% against reasonable accessibility.

49.4% of the Respondents believed that information stored on handheld devices was not reasonably accessible.

And 33% of the Respondents believed that information stored on floppy discs was not reasonably accessible.

Accordingly, the first impressions of the corporate lawyer about reasonable accessibility are not easily predictable.

Please refer to Tables 49 to 55 of Appendix A

Tables 49-55

Please indicate whether each of the following types of ESI is "reasonably accessible"

	Yes		No		Don't Know		Total
Information stored on backup tapes	159	59.6%	63	23.6%	45	16.9%	267
Information stored on backup servers	160	59.9%	52	19.5%	55	20.6%	267
Legacy data stored on obsolete software or hardware	21	7.9%	173	64.8%	73	27.3%	267
Encrypted information	58	21.7%	100	37.5%	109	40.8%	267
Information stored on handheld devices used by employees	54	20.2%	132	49.4%	81	30.3%	267
Information stored on laptops used by employees	155	58.1%	65	24.3%	47	17.6%	267
Information stored on floppy discs	119	44.6%	88	33.0%	60	22.5%	267

SUMMARY

The nation's corporate counsel are currently largely unfamiliar with the proposed changes to the Federal Rules of Civil Procedure as they relate to the handling of electronically stored information. Nevertheless, they have substantial experience in dealing with the issues both as plaintiffs, and as defendants, and in multiple cases. Many of the higher level attorneys in some of the nation's biggest companies apparently were interested enough in this subject to have volunteered to respond to this Survey.

The costs of electronic discovery are not forcing settlements to any significant degree. Rather, corporations are discovering electronically stored information under the current rules, in due course. Nor do threats of spoliation sanctions appear to dominate recent cases—although the issue is clearly on the minds of the Respondent group.

In many areas, the litigation practice appears to be in a period of transition. Although many Respondents indicated that "paper" was the most recent way they received ESI, various electronic formats, including "native files," are also now prevalent. Many Respondents indicate that electronic discovery is driving corporate data management policies, although few have found cost effective tools to search ESI to find privileged materials. Exactly how data management is being affected was not revealed by the Survey. And the lack of cost effective tools is perhaps demonstrated by the real world occurrence of inadvertent production of attorney/client privileged materials, which was reported in the Survey.

When questioned about the apparent policies underlying the proposed rule changes, the Respondents generally were quite supportive of focusing litigants' attention on the areas spotlighted by the rule drafters. For example, many Respondents believe that the issue of inadvertent production of privileged material "definitely needs addressing," as do most other of the subject matter areas implicated by the proposed rule changes. According to the Survey, the proposed rules amendments are most definitely on the right track — and in harmony with the perceived needs and experiences of corporate counsel who, in fact, were largely unaware of the possibility of amendments.

A new "complexity" in information is clearly influencing litigation. As only one example of this trend, the Respondents gave highly unpredictable and contradictory responses to what type of electronically stored information was considered by them to be "reasonably accessible," thus demonstrating the ever-changing nature of the information dynamic, and the lack of consensus about technology use. Although not tested by the Survey, it is clear that in many of these large corporations there are multiple information systems, each one complex and probably not fully understood by the workers in the enterprise.

With such complexity comes the opportunity for gamesmanship, litigation's long-time companion. One of the key findings of the Survey is that when working in the less adversarial arena of meet and confer sessions, advocates can reach agreement on ESI issues. Even controversial topics such as privilege waiver and spoliation can be discussed and handled amicably. Given the complexity of the new information paradigm; the vast amount of data to be searched; and the concomitant opportunities for gamesmanship in discovery, the regime of the proposed amendments will probably only work if fair-minded "cooperation" and a proper narrowing of issues occurs. Indeed, in order to get at the evidence, the advocates will need to understand and discuss the various complex information systems which function both at their

client's place of business, and at the opponent's. Collaboration and fair-minded exchange of information will likely be essential in future discovery regimes.

RESEARCH SUPERVISION

Dr. Gary T. Ford, American University

Professor of Marketing in the Kogod School of Business at American University. Formerly, Chair and Associate Professor of Marketing in the College of Business and Management at the University of Maryland at College Park and Visiting Professor in the Department of Applied Economics at Catholic University of Leuven, Belgium. During his career, Dr. Ford has taught undergraduate and MBA courses in Marketing Research and Doctoral Seminars on Research Methodology, as well as Marketing Management, Consumer Behavior and other courses. The Marketing Research and Research Methods courses taught include material on survey research design, questionnaire design, sampling, statistical methods and other topics. Research has been published in the *Journal of Consumer Research*, *Journal of Marketing*, *Journal of Public Policy and Marketing*, *Journal of Marketing Research* and other journals, books and proceedings. In 1996 Dr. Ford was listed as one of the "best researchers in marketing" in an article published in the *Marketing Educator*. Dr. Ford has served on the Board of Directors of the Association for Consumer Research, the largest academic organization in the field of consumer behavior, for four years and has served as an Editorial Review Board member for *Journal of Marketing* for over ten years.

At present, Dr. Ford serves on the Editorial Review Board of the *Journal of Public Policy and Marketing* and frequently reviews manuscripts for *Journal of Consumer Research*, *Journal of Marketing Research*, *Journal of Marketing* and other journals and conferences. He has served as a Marketing Expert for the Federal Trade Commission in both consumer protection and antitrust matters. He has also served as an expert witness in both false advertising and trademark cases. In the summer of 2004 he prepared an expert report and testified on behalf of Polo Ralph Lauren in an Arbitration Panel hearing (United States Polo Association, et al. v PRL USA Holdings, Inc., et al.) in Stockholm, Sweden.

A complete copy of Dr. Ford's resume is attached to this Report as Appendix C.

Larry Herman from Target Research Group

The interviewing process was supervised by Larry Herman. Mr. Herman has extensive experience in advertising research and special expertise in research for litigation purposes including claims substantiation research.

Larry Herman is Vice President of Target Research Group. Larry is a veteran quantitative researcher with over thirty years experience in the field. He is experienced in all aspects of research, including customer satisfaction, market segmentation, and new product development for clients in the packaged goods, pharmaceuticals, retail, telecommunications, financial as well as other fields. Larry has developed and managed many large-scale customer satisfaction tracking research programs for retail and financial institutions. Prior to joining Target Research Group in November 2003, Larry worked at many of the largest market research company's including Audits & Surveys, Market Facts, Guideline Research, Harte-Hanks Market Research, BAIGlobal and Synovate.

Mr. Herman is an expert in conducting quantitative research for use in litigation. For nearly 20 years, he has conducted hundreds of legal studies; including claims substantiation,

misleading advertising, trademark and trade dress issues. Larry has published articles on the intricacies of legal research. (e.g. "Using Survey Research to Win Intellectual Property Disputes", *Intellectual Property Today*, December 1999)

APPENDIX A
Supporting Tables

Table 2

Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred

	Results	% of Total
0	32	12.0%
1-3	71	26.6%
4-6	39	14.6%
7-10	25	9.4%
10+	65	24.3%
Don't Know	35	13.1%
Total	267	100.0%

Table 3

How many of those lawsuits in which your organization was a plaintiff included electronic discovery

	Results	% of Total
0	36	13.5%
1-3	76	28.5%
4-6	30	11.2%
7-10	12	4.5%
10+	23	8.6%
Don't Know	58	21.7%
No lawsuits with discovery	32	12.0%
Total	267	100.0%

Table 4

Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred

	Results	% of Total
0	5	1.9%
1-3	34	12.7%
4-6	21	7.9%
7-10	26	9.7%
10+	160	59.9%
Don't Know	21	7.9%
Total	267	100.0%

Table 5

How many of those lawsuits in which your organization was a defendant included electronic discovery

	Results	% of Total
0	2	0.7%
1-3	65	24.3%
4-6	34	12.7%
7-10	22	8.2%
10+	85	31.8%
Don't Know	54	20.2%
No lawsuits with discovery	5	1.9%
Total	267	100.0%

Table 6

Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed

	Results	% of Total
Plaintiff	20	7.5%
Defendant	175	65.5%
Both defendant and counterclaimant	44	16.5%
Other	28	10.5%
Total	267	100.0%

Table 7

Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery

	Results	% of Total
Yes	68	25.5%
No	141	52.8%
Don't know	58	21.7%
Total	267	100.0%

Table 8

What was the final result of the pre-discovery meeting(s) regarding electronic discovery

	Results	% of Total
Agreed on ED issues without Court assistance	33	12.4%
Agreed on ED issues with Court assistance	14	5.2%
Did not agree and Court mandated ED terms	10	3.7%
Other	3	1.1%
Don't know	8	3.0%
Did not have meeting or didn't know of one	199	74.5%
Total	267	100.0%

Table 9

Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)

	Results	% of Total
Yes, agreement reached without assistance from Court	60	22.5%
Yes, agreement reached with assistance from Court	12	4.5%
Yes, form of production mandated by court	8	3.0%
No	109	40.8%
Don't know	78	29.2%
Total	267	100.0%

Table 10

In what form was ESI to be produced
(multiple answers accepted)

	Results	% of Total
Paper or hardcopy	37	13.9%
TIFF or PDF without metadata	15	5.6%
TIFF or PDF with metadata	16	6.0%
As stored in normal course of business	24	9.0%
Searchable form without metadata	12	4.5%
Searchable form with metadata	8	3.0%
Other	0	0.0%
Don't know	10	3.7%
No meeting held or results not known	187	70.0%
Total Respondents	267	

Table 11

Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)

	Results	% of Total
Yes, agreement reached without assistance from Court	61	22.8%
Yes, agreement reached with assistance from Court	12	4.5%
Yes, form of production mandated by court	14	5.2%
No	106	39.7%
Don't know	74	27.7%
Total	267	100.0%

Table 13

Was preservation of ESI discussed in the pre-discovery meeting(s)

	Results	% of Total
Yes, agreement reached without assistance from Court	60	22.5%
Yes, agreement reached with assistance from Court	13	4.9%
Yes, form of production mandated by court	6	2.2%
No	108	40.4%
Don't know	80	30.0%
Total	267	100.0%

Table 15

Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)

	Results	% of Total
Yes, agreement reached without assistance from Court	40	15.0%
Yes, agreement reached with assistance from Court	10	3.7%
Yes, form of production mandated by court	2	0.7%
No	118	44.2%
Don't know	97	36.3%
Total	267	100.0%

Table 16

Did either your organization or the other party inadvertently produce privileged ESI

	Results	% of Total
Yes, my organization inadvertently produced	15	6%
Yes, the other party inadvertently produced	9	3%
Yes, we both inadvertently produced	8	3%
No	138	52%
Don't know	97	36%
Total	267	100%

Table 17

What was the outcome of inadvertently producing privileged ESI

	Results	% of Total
Amicably resolved by parties	14	5.2%
Parties disagreed but did not pursue with Court	8	3.0%
Court intervened & upheld claim of privilege	5	1.9%
Court intervened & denied claim of privilege	1	0.4%
Other	2	0.7%
Don't know	2	0.7%
No meeting known of or not held	235	88.0%
Total	267	100.0%

Table 18

In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery

	Results	% of Total
Reduced cost substantially	26	9.7%
Reduced cost moderately	38	14.2%
Had no effect	47	17.6%
Increased cost moderately	7	2.6%
Increased cost substantially	2	0.7%
Don't know	147	55.1%
Total	267	100.0%

Table 21

Was the issue of "sanctions" for spoliation of ESI raised by either party in this case

	Results	% of Total
Yes, we requested opposing party be sanctioned	6	2.2%
Yes, opposing party requested we be sanctioned	13	4.9%
Yes, both parties requested sanctions	4	1.5%
No	174	65.2%
Don't know	70	26.2%
Total	267	100.0%

Table 22

What was the outcome of the request for sanction

Outcome of request for sanction for spoliation (12b)	Results	% of Total
No sanctions imposed on either party	13	56.5%
Court threatened to sanction my organization	2	8.7%
Court threatened to sanction opposing party	2	8.7%
Court sanctioned my organization	0	0.0%
Court sanctioned opposing party	1	4.3%
Don't know	5	21.7%
Total	23	100.0%

Table 28

Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery

	Results	% of Total
Familiar with all proposed amendments	19	7.1%
Familiar with some of proposed amendments	28	10.5%
Knew there were amendments, not familiar with any	130	48.7%
Did not know there were amendments	90	33.7%
Other	0	0.0%
Total	267	100.0%

Table 29

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"

	Results	% of Total
Definitely Address	89	33.3%
Probably Address	121	45.3%
Probably Not Address	19	7.1%
Definitely Not Address	13	4.9%
Don't Know	25	9.4%
Total	267	100.0%

Table 30

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to alert the parties regarding the potential need to adopt provisions
against waiving privilege in cases involving electronic discovery"

	Results	% of Total
Definitely Address	97	36.3%
Probably Address	111	41.6%
Probably Not Address	29	10.9%
Definitely Not Address	10	3.7%
Don't Know	20	7.5%
Total	267	100.0%

Table 31

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to alert the parties regarding the potential need to address issues of
electronic discovery in meet and confer sessions"

	Results	% of Total
Definitely Address	74	27.7%
Probably Address	128	47.9%
Probably Not Address	36	13.5%
Definitely Not Address	10	3.7%
Don't Know	19	7.1%
Total	267	100.0%

Table 32

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to alert the parties regarding the potential need to adopt provisions
concerning the preservation of discoverable ESI"

	Results	% of Total
Definitely Address	83	31.1%
Probably Address	127	47.6%
Probably Not Address	31	11.6%
Definitely Not Address	10	3.7%
Don't Know	16	6.0%
Total	267	100.0%

Table 33

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced”

	Results	% of Total
Definitely Address	86	32.2%
Probably Address	119	44.6%
Probably Not Address	30	11.2%
Definitely Not Address	14	5.2%
Don't Know	18	6.7%
Total	267	100.0%

Table 34

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it”

	Results	% of Total
Definitely Address	129	48.3%
Probably Address	89	33.3%
Probably Not Address	27	10.1%
Definitely Not Address	6	2.2%
Don't Know	16	6.0%
Total	267	100.0%

Table 35

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to allow parties to claim and perhaps prove ESI is not reasonably accessible”

Allow parties to claim and perhaps prove ESI is not reasonably accessible	Results	% of Total
Definitely Address	159	59.6%
Probably Address	79	29.6%
Probably Not Address	10	3.7%
Definitely Not Address	7	2.6%
Don't Know	12	4.5%
Total	267	100.0%

Table 36

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to require the parties to potentially allow discovery of any designated ESI
in any medium”

	Results	% of Total
Definitely Address	73	27.3%
Probably Address	108	40.4%
Probably Not Address	39	14.6%
Definitely Not Address	22	8.2%
Don't Know	25	9.4%
Total	267	100.0%

Table 37

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to allow the requestor to specify the form in which the ESI is to be
produced”

	Results	% of Total
Definitely Address	64	24.0%
Probably Address	85	31.8%
Probably Not Address	38	14.2%
Definitely Not Address	62	23.2%
Don't Know	18	6.7%
Total	267	100.0%

Table 38

Indicate how you perceive the issue raised in the proposed amendment:
“Amending the FRCP to allow the responder to provide reasons for objecting to the request for
ESI”

	Results	% of Total
Definitely Address	129	48.3%
Probably Address	90	33.7%
Probably Not Address	25	9.4%
Definitely Not Address	9	3.4%
Don't Know	14	5.2%
Total	267	100.0%

Table 39

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order"

	Results	% of Total
Definitely Address	122	45.7%
Probably Address	99	37.1%
Probably Not Address	16	6.0%
Definitely Not Address	15	5.6%
Don't Know	15	5.6%
Total	267	100.0%

Table 40

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to allow responders to only produce ESI in one form"

	Results	% of Total
Definitely Address	100	37.5%
Probably Address	88	33.0%
Probably Not Address	35	13.1%
Definitely Not Address	25	9.4%
Don't Know	19	7.1%
Total	267	100.0%

Table 41

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to limit sanctions for routine purging of computer systems that results in the destruction of otherwise discoverable ESI"

	Results	% of Total
Definitely Address	170	63.7%
Probably Address	65	24.3%
Probably Not Address	14	5.2%
Definitely Not Address	6	2.2%
Don't Know	12	4.5%
Total	267	100.0%

Table 42

Indicate how you perceive the issue raised in the proposed amendment:
"Amending the FRCP to limit sanctions for the destruction of otherwise discoverable ESI unless there is a finding of intentionality or recklessness"

	Results	% of Total
Definitely Address	158	59.2%
Probably Address	76	28.5%
Probably Not Address	12	4.5%
Definitely Not Address	7	2.6%
Don't Know	14	5.2%
Total	267	100.0%

Table 43

Agreement rating with each of the following statements:
"The requirements for electronic discovery have led to changes in the policies for electronic storage of information at my organization"

	Results	% of Total
Strongly Agree	73	27.3%
Agree	112	41.9%
Disagree	42	15.7%
Strongly Disagree	8	3.0%
Don't Know	32	12.0%
Total	267	100.0%

Table 44

Agreement rating with each of the following statements:
"My organization has decreased the number of days it keeps ESI on the computer system to reduce the cost of responding to requests for discovery of ESI"

	Results	% of Total
Strongly Agree	20	7.5%
Agree	52	19.5%
Disagree	112	41.9%
Strongly Disagree	30	11.2%
Don't Know	53	19.9%
Total	267	100.0%

Table 45

Agreement rating with each of the following statements:
"My organization has developed a cost effective procedure for searching ESI to identify privileged materials"

	Results	% of Total
Strongly Agree	4	1.5%
Agree	30	11.2%
Disagree	122	45.7%
Strongly Disagree	55	20.6%
Don't Know	56	21.0%
Total	267	100.0%

Table 46

Agreement rating with each of the following statements:
"The requirements to preserve electronic information that normally would be purged from our computer systems substantially disrupted my organization's routine business operations."

	Results	% of Total
Strongly Agree	63	23.6%
Agree	79	29.6%
Disagree	63	23.6%
Strongly Disagree	14	5.2%
Don't Know	48	18.0%
Total	267	100.0%

Table 47

Agreement rating with each of the following statements:
"The requirements to preserve electronic information substantially increased the costs of electronic discovery"

	Results	% of Total
Strongly Agree	80	30.0%
Agree	91	34.1%
Disagree	43	16.1%
Strongly Disagree	4	1.5%
Don't Know	49	18.4%
Total	267	100.0%

Table 48

Agreement rating with each of the following statements:
"My organization settled the case in which electronic discovery was most recently completed to avoid the financial costs of electronic discovery"

	Results	% of Total
Strongly Agree	8	3.0%
Agree	20	7.5%
Disagree	117	43.8%
Strongly Disagree	69	25.8%
Don't Know	53	19.9%
Total	267	100.0%

Tables 49-55.

Please indicate whether each of the following types of ESI is "reasonably accessible"

	Yes		No		Don't Know		Total
Information stored on backup tapes	159	59.6%	63	23.6%	45	16.9%	267
Information stored on backup servers	160	59.9%	52	19.5%	55	20.6%	267
Legacy data stored on obsolete software or hardware	21	7.9%	173	64.8%	73	27.3%	267
Encrypted information	58	21.7%	100	37.5%	109	40.8%	267
Information stored on handheld devices used by employees	54	20.2%	132	49.4%	81	30.3%	267
Information stored on laptops used by employees	155	58.1%	65	24.3%	47	17.6%	267
Information stored on floppy discs	119	44.6%	88	33.0%	60	22.5%	267

Table 56

Type of organization you work for:

	Results	% of Total
Private Corporation	199	74.5%
Private Law Firm	1	0.4%
State Government	7	2.6%
Federal Government	0	0.0%
Not-for-profit	37	13.9%
Other	23	8.6%
Total	267	100.0%

Table 57

SIC category for your organization:

SIC Code	Results	% of Total
Agriculture	1	0.4%
Mining	5	1.9%
Construction	5	1.9%
Manufacturing	87	32.6%
Transportation, Communication, Electric, Gas & Sanitary Services	38	14.2%
Wholesale Trade	8	3.0%
Retail Trade	14	5.2%
Finance, Insurance & Real Estate	54	20.2%
Business Services	17	6.4%
Professional Services	28	10.5%
Public Administration	10	3.7%
Total	267	100.0%

Table 58

Total Revenue of your organization in 2004:

Revenue	Results	% of Total
Less than \$1,000,000	3	1.1%
\$1,000,000 - \$9,999,999	14	5.2%
\$10,000,000 - \$49,999,999	19	7.1%
\$50,000,000 - \$999,999,999	12	4.5%
\$100,000,000 - \$499,999,999	32	12.0%
\$500,000,000 - \$999,999,999	36	13.5%
\$1,000,000,000 - \$9,999,999,999	90	33.7%
\$10,000,000,000 +	61	22.8%
Total	267	100.0%

Table 59

Number of full-time in-house lawyers employed by organization:

Number of Lawyers in Organization	Results	% of Total
1	18	6.7%
2-5	80	30.0%
6-10	52	19.5%
11-20	36	13.5%
21-50	30	11.2%
51+	48	18.0%
Don't know	3	1.1%
Total	267	100.0%

Table 60

Number of years since graduated from law school:

Years	Results	% of Total
1	0	0.0%
2-5	9	3.4%
6-10	21	7.9%
11-20	100	37.5%
21-30	112	41.9%
31+	25	9.4%
Total	267	100.0%

Table 61

Current position in organization:

Current Position	Results	% of Total
Head lawyer at organization	69	25.8%
Senior lawyer Supervising other attorneys	106	39.7%
Staff Lawyer	80	30.0%
Other	12	4.5%
Total	267	100.0%

APPENDIX B

EMAIL INVITATIONS
WEB QUESTIONNAIRE

Original Invitation Email

To: (Respondent's name or email)
From: ABA Section on Science and Technology Law
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

Dear Fellow Lawyer:

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

The proposed amendments could have a significant impact on the discovery of electronically stored information and could thus have a direct effect on your organization. The survey gathers information about your current practices for electronically stored information and your views regarding the proposed amendments.

Target Research Group (TRG), a national survey research firm, has been commissioned to conduct the survey and to compile the results. All respondents are guaranteed anonymity, and your responses will be used only in the aggregate.

Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

If you have any questions about the survey, please contact:

1. George Paul, Chair, Digital Evidence Project, gpaul@lrlaw.com, 602-262-5326;
2. Mike Prounis, Digital Evidence Project, michael.prounis@evidenceexchange.com, 212-594-2501; or
3. Mike Faraci, Digital Evidence Project, mfaraci@NavigantConsulting.com, 202-973-2431

This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong
Chair, 2004-05
ABA Section of Science & Technology Law

Second E-mail with Incentive

Dear Fellow Lawyer,

Below is a letter from Ivan Fong, asking you for your help concerning a very important survey we are conducting on behalf of the ABA (American Bar Association). Unfortunately, our deadline for collecting surveys is quickly approaching. Therefore, to show our appreciation for your quick response, we will send an Executive Summary of the survey results and **donate \$10** to the Red Cross Tsunami Relief Fund on behalf of each person who completes the survey.

Below is the link to the survey as well as the letter from Mr. Fong.

<Insert link>

Thanks again in advance for your help.

(insert text of original email)

To: (Respondent's name or email)
From: ABA Section on Science and Technology Law
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

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Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

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This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong
Chair, 2004-05
ABA Section of Science & Technology Law

MAIN QUESTIONNAIRE

Digital Evidence Questionnaire

Section I - Screening questions

The purpose of these questions is to determine your organization's experience with discovery of electronically stored information.

1. Has your organization been either a defendant or plaintiff in at least one lawsuit that was filed after January 1, 2000?

- Yes → continue
No → Go to Section V
Don't know → Go to section V

Definition

For purposes of this survey:

Electronic discovery refers to the discovery of electronically stored information (ESI) including email, word processing documents, spreadsheets, voice mail, and virtually anything that is stored in electronic form on networks, servers, personal computers, floppy discs, hard drives, back-up tapes and other devices.

ESI is used as an acronym for "electronically stored information"

Organization as Plaintiff:

2a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as plaintiff, discovery occurred:

- 0 → go to Q. 3a
1-3
4-6
7-10
If more than 10, enter approximate number: _____
Don't know

2b. How many of those lawsuits in which your organization was a plaintiff included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

Organization as defendant:

3a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as defendant, discovery occurred:

- 0 → go to box before Q4
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

3b. How many of those lawsuits in which your organization was a defendant included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: _____
- Don't know

If "0" to 2a and "0" to 3a go to Section V
If "0" to 2a and "0" to 3b go to Section V
If "0" to 2b and "0" to 3a go to Section V
If "0" to 2b and "0" to 3b go to Section V
If DK to 2a and 2b and 3a and 3b terminate

Section II – Experience with electronic discovery in most recent case

The next series of questions should be answered regarding the most recent experience your organization has had in which electronic discovery occurred.

Definitions of terms used in this section

“Metadata” is information about a particular data set which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Usually, metadata is not visible on the screen but is automatically appended to the file.

“Legacy data” is information is that the organization has stored on software or hardware that has been rendered obsolete or outmoded.

4. Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed?

- Plaintiff
- Defendant
- Both defendant and counter claimant
- Other (please explain)

5a. Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?

- Yes → continue
- No → go to Q6
- Don't know → go to Q6

5b. What was the final result of the pre-discovery meeting(s) regarding electronic discovery?

- The parties agreed on the issues regarding electronic discovery without assistance of Court → Continue
- The parties agreed on the issues regarding electronic discovery with assistance of Court → Continue
- The parties did not agree on the issues regarding electronic discovery and the Court mandated the terms for electronic discovery. → Continue
- Other (please explain) → Continue
- Don't know → Continue

Form of production:

6a. Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; form of production was ordered by court
- No → go to Q7a
- Don't know → go to Q7a

6b. In what form was ESI to be produced? (check all that apply)

- ESI was to produced as paper or hardcopy
- ESI was to produced as TIFF or PDF without corresponding metadata
- ESI was to produced as TIFF or PDF with corresponding metadata
- ESI was to be produced as stored in normal course of business

ESI was to be produced in searchable form without metadata
ESI was to be produced in searchable form with metadata
Other (please describe)
Don't know

Discovery of email:

7a. Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court
Yes; agreement was reached with assistance of court
Yes; email that would be subject to discovery was ordered by court
No
Don't know

→ go to Q8a
→ go to Q8a

7b. What email was subject to discovery? (check all that apply)

Email currently on computer system and/or network
Email that has been deleted
Email stored in backup tapes, discs or servers
Legacy data email stored on obsolete systems
Other (please specify)
Don't know

Preservation of ESI:

8a. Was preservation of ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court
Yes; agreement was reached with assistance of court
Yes; ESI subject to preservation was ordered by court
No
Don't know

→ go to Q9a
→ go to Q9a

8b. What ESI was subject to preservation? (check all that apply)

ESI that is currently on the computer system was required to be preserved.

ESI that would be purged from our computer system under normal business practices was required to be preserved

Other (please specify)

Don't know

Protection against waiving privilege:

9a. Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; requirements for claiming privilege for ESI were ordered by court
- No
- Don't know

9b. Did either your organization or the other party inadvertently produce privileged ESI?

- Yes, my organization inadvertently produced privileged ESI
- Yes, the other party inadvertently produced privileged ESI
- Yes, we both inadvertently produced privileged ESI
- No → go to Q10
- Don't know → go to Q10

9c. What was the outcome of inadvertently producing privileged ESI?

- Amicably resolved by parties
- Parties disagreed but did not pursue disagreement with Court
- Court intervened and upheld claim of privilege for ESI
- Court intervened and denied claim of privilege for ESI
- Other (please explain)
- Don't know

10. In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery?

- Pre-discovery meeting(s) reduced cost of discovery of ESI substantially
- Pre-discovery meeting(s) reduced cost of discovery of ESI moderately
- Pre-discovery meeting(s) had no effect on cost of discovery of ESI
- Pre-discovery meeting(s) increased cost of discovery of ESI moderately
- Pre-discovery meeting(s) increased cost of discovery of ESI substantially
- Don't know

Sanctions:

11a. Was the issue of "sanctions" for failure to produce discoverable ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q12a
- Don't know → go to Q12a

11b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party

- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

12a. Was the issue of "sanctions" for spoliation of ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q13a
- Don't know → go to Q13a

12b. What was the outcome of the request for sanction? (check all that apply)

- No sanctions were imposed on either party
- The Court threatened to sanction my organization
- The Court threatened to sanction the opposing party
- The Court sanctioned my organization
- The Court sanctioned the opposing party
- Don't know

13a. What was the total amount spent on discovery of any kind in this case?

Write in amount spent on discovery: \$ _____

13b. What was the total amount spent on electronic discovery including amount spent on outside counsel and on outside vendors to help with discovery of ESI?

Write in amount spent on electronic discovery: \$ _____

13c. What percentage of the amount spent on electronic discovery was spent on privilege review before production of ESI?

Percentage of electronic discovery
spent on privilege review of ESI: _____%

13d. What percentage of the amount spent on electronic discovery was spent on outside vendors to assist in discovery of ESI?

Percentage of electronic discovery
spent on outside vendors for discovery of ESI: _____%

14. What was the resolution of this case?

- Case dismissed
- Case settled
- Case still continuing

- Case went to trial
- Case on appeal
- Other (please explain)
- Don't know

Section III – Opinions regarding Proposed
Amendments to Federal Rules of Civil Procedure

As you may know, the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedures recently published proposed amendments to the Federal Rules of Civil Procedure (FRCP) that affect discovery of electronically stored information. The next set of questions summarize the proposed amendments and ask whether you perceive that the issues raised in the proposed amendments needed addressing.

15. Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery?

- I was familiar with all of the proposed amendments
- I was familiar with some of the proposed amendments
- I knew there were proposed amendments but I was not familiar with any
- I did not know there were proposed amendments
- Other (please explain)

16. Please indicate whether you perceive that the issue raised in the proposed amendments "Definitely Needed Addressing" (Def Add), "Probably Needed Addressing" (Prob Add), "Probably Did Not Need Addressing" (Prob Not Add) or "Definitely Did Not Need Addressing" (Def Not Add) by "clicking" on the appropriate response.

16a. Proposed changes to Rule 16.

At present Rule 16 encompass the pretrial scheduling order issued by the court. The proposed amendments to Rule 16 indicate the scheduling order may also address "provisions for the disclosure or discovery of electronically stored information" (ESI) and "adoption of the parties' agreement for protection against waiving privilege."

	Def Add	Prob Add	Prob Not Add	Def Not Add	Don't Know
Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Amending the FRCP to alert the parties regarding the potential need to adopt provisions against waiving privilege in cases involving electronic discovery.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

16b. First set of proposed changes to Rule 26:

At present Rule 26 addresses pretrial “meet and confer” sessions for planning for discovery. The proposed amendments state that pretrial meet and confer sessions include planning for discovery include issues “relating to preserving discoverable information,” and “any issues relating to the disclosure or discovery of ESI, including the form in which it should be produced.”

Amending the FRCP to alert the parties regarding the potential need to address issues of electronic discovery in meet and confer sessions.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions concerning the preservation of discoverable ESI.

Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced.

16c. Second proposed change to Rule 26.

The proposed amendments also are concerned with a party’s response to a claim of privilege for ESI that was inadvertently produced. After being notified of a claim of privilege, any party who received the privileged ESI “must promptly return sequester, or destroy the specified information and any copies.”

Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it.

16d. Third proposed change to Rule 26.

The proposed amendment states that, “A party need not provide discovery of ESI that the party identifies as not reasonably accessible.” If the opposing party objects, the party must then show why the ESI is not reasonably accessible and the court may order none, some or all of the ESI be produced.

Amending the FRCP to allow parties to claim and perhaps prove ESI is not reasonably accessible.

16e. First Proposed change to Rule 34

Rule 34 is concerned with the production and inspection of documents in discovery. The proposed amendments extend discovery to “any designated electronically stored information or any designated documents (... in any medium – from which information can be obtained...).”

Amending the FRCP to require the parties to potentially allow discovery of any designated ESI in any medium.

16f. Second proposed change to Rule 34.

A second proposed change to Rule 34 is concerned with the form of production for ESI. The proposed amendment allows the requestor to specify the form in which ESI is to be produced and allows the responder to provide (a) reason(s) for objecting to the request, such as the information is not reasonably accessible in that form. If the parties cannot agree on the form of production and the Court does not order a form of production, as a last resort, the proposed amendment also requires the information must be supplied in the form in which it is ordinarily maintained or in electronically searchable form. The proposed amendment also states, "The party need only produce such information in one form."

Amending the FRCP to allow the requestor to specify the form in which the ESI is to be produced.

Amending the FRCP to allow the responder to provide reasons for Objecting to the request for ESI.

Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order.

Amending the FRCP to allow responders To only produce ESI in one form.

16g. Proposed change to Rule 37.

Rule 37 is concerned with failure to make disclosures or cooperate in discovery. The proposed amendments would prevent the Court from imposing sanctions "if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable" and information was lost because "of the routine operation of the party's electronic information system." As an alternative to the proposed amendment, it has been suggested that the judge be required to make a finding of intentionality or recklessness before sanctions can be issued for the destruction of otherwise discoverable ESI.

Amending the FRCP to limit sanctions for Routine purging of computer systems that Results in the destruction of otherwise Discoverable ESI.

Amending the FRCP to limit sanctions for the destruction of otherwise discoverable ESI unless there is a finding of intentionality or recklessness.

Section IV – Opinions Regarding the Affects of Electronic Discovery
And the Likely Effects of the Proposed Amendments on Your Organization

17. Please indicate whether you "strongly agree," "agree," "disagree" or "strongly disagree" with each of the following statements.

The requirements for electronic discovery have led to changes in the policies for electronic storage of information at my organization.	SA	A	D	SD	DK
My organization has decreased the number of days it keeps ESI on the computer system to reduce the cost of Responding to requests for discovery of ESI.	SA	A	D	SD	DK
My organization has developed a cost-effective procedure for searching ESI to identify privileged materials.	SA	A	D	SD	DK
The requirements to preserve electronic information that normally would be purged from our computer system substantially disrupted my organization's routine business operations.	SA	A	D	SD	DK
The requirements to preserve electronic information substantially increased the costs of electronic discovery.	SA	A	D	SD	DK
My organization settled the case in which electronic discovery was most recently completed to avoid the financial costs of electronic discovery.	SA	A	D	SD	DK

18. Please indicate whether each of the following types of ESI is "reasonably accessible."

	Yes	No	DK
Information stored on back-up tapes/discs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on back-up servers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legacy data stored on obsolete software or hardware.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encrypted information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on handheld devices used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on laptops used by employees.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information stored on floppy discs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section V: Descriptive information about you and your organization

Information about your organization:

19a. What type of organization do you work for:

- Private corporation
- Private law firm
- State Government
- Federal Government

Not-for-profit _____ → go to 19c
Other (Please specify) _____ → go to 19c

19b. What is the SIC category for your corporation?

Agriculture, Forestry and Fishing
Mining
Construction
Manufacturing
Transportation, Communication, Electric, Gas and Sanitary Services
Wholesale trade
Retail Trade
Finance, Insurance and Real Estate
Business Services
Professional Services
Public Administration

19c. What was the approximate total annual revenue of your organization for 2004?

Less than \$1,000,000
\$1,000,000 but less than \$10,000,000
\$10,000,000 but less than \$50,000,000
\$50,000,000 but less than \$100,000,000
\$100,000,000 but less than \$500,000,000
\$500,000,000 but less than \$1,000,000,000
\$1,000,000,000 but less than \$10,000,000,000
\$10,000,000,000 or more

19d. Approximately, how many full-time in-house lawyers does your organization employ?

1
2-5
6-10
11-20
21-50
51 or more
Don't know

Information about you:

20a. How many years has it been since you graduated from law school?

1
2-5
6-10
11-20
21-30
31 or more

20b. What is your current position at your organization?

Head lawyer at organization
Senior lawyer supervising other attorneys
Staff lawyer
Other (specify)

20c. What is your gender?

Female
Male

Thank you for completing this survey.
Please click on the button below to submit.

APPENDIX C

Dr. Gary T. Ford

Target Research Group

Lewis and Roca, LLP

Evidence Exchange

Navigant Consulting, Inc.

Gary T. Ford

American University
4400 Massachusetts Ave., N.W.
Washington, D.C. 20016
Tel. (202) 885-1978
Fax (202) 885-2691

EDUCATION

Ph.D., Marketing, STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY, 1973.
M.B.A., Marketing, STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY, 1968.
B.B.A., Accounting, CLARKSON COLLEGE, Potsdam, NY, 1966.

PRESENT POSITION

AMERICAN UNIVERSITY, Kogod School Business, Washington, D.C., 1985-present
Professor of Marketing

ACADEMIC/PROFESSIONAL EXPERIENCE

AMERICAN UNIVERSITY, Kogod School of Business, Washington, D.C.,
Professor of Marketing, 1985-present.
Chairman of Marketing, 1989-94, 1999-2001, 2004.

CATHOLIC UNIVERSITY OF LEUVEN, Department of Applied Economics, Leuven,
Belgium, 1991-1992
Visiting Professor of Marketing

UNIVERSITY OF MARYLAND, College of Business and Management
Chairman, Faculty of Marketing, 1980-1985
Associate Professor of Marketing, 1978-1985
Assistant Professor of Marketing, 1973-1978

FEDERAL TRADE COMMISSION, Bureau of Economics, 1979-1980
Visiting Marketing Professor, Division of Consumer Protection

PUBLICATIONS

Refereed Journal Publications

- 1) "Effects of Donor Recruitment Methods on Population Responses," with E.L. Wallace, *Transfusion*, pp. 159-164 (March-April 1975).
- 2) "A Study of Prices and Market Shares in the Computer Mainframe Industry," with B.T. Ratchford, *Journal of Business*, pp. 194-218 (April 1976).
- 3) "Some Relationships of States' Characteristics to the Passage of Consumer Legislation," *Journal of Consumer Affairs*, pp. 177-182 (Summer 1977).
- 4) "Perceptions of Uncertainty Within A Buying Task Group," with R.E. Spekman, *Industrial Marketing Management*, pp. 395-403 (December 1977).
- 5) "Adoption of Consumerism Policy by the States: Some Empirical Perspectives," *Journal of Marketing Research*, pp. 125-134 (February 1978).
- 6) "A Study of Prices and Market Shares in the Computer Mainframe Industry: Reply," with B.T. Ratchford, *Journal of Business*, pp. 125-135 (January 1979).
- 7) "Evaluation of Consumer Education Programs," with P.N. Bloom, *Journal of Consumer Research*, pp. 270-279 (December 1979).
- 8) "Marketing and Marketing Research for Information Scientists," with P. Wasserman, *Journal of Library Administration*, pp. 27-31 (Fall 1982).
- 9) "Viewer Miscomprehension of Televised Communications: A Comment," with R. Yalch, *Journal of Marketing*, pp. 27-31 (Fall 1982). Reprinted in *Mass Communication Review Yearbook Vol. 4*, E. Wartella, D.C. Whitney and S. Windall (eds.), Beverly Hills: Sage Publications, pp. 145-150 (1983).
- 10) "Unit Pricing Ten Years Later: A Replication," with D.A. Aaker, *Journal of Marketing*, pp. 118-122 (Winter 1983).
- 11) "Recent Developments in FTC Policy on Deception," with J.E. Calfee, *Journal of Marketing*, 82-103 (July 1986).
- 12) "Inferential Beliefs in Consumer Evaluations: An Assessment of Alternative Processing Strategies," with R.A. Smith, *Journal of Consumer Research*, pp. 363-371 (December 1987).
- 13) "Consumer Skepticism of Advertising Claims: Testing Hypotheses from Economics of Information," with D.B. Smith and J.L. Swasy, *Journal of Consumer Research*, pp. 433-441 (March 1990).
- 14) "Normative Values for the Beck Anxiety Inventory, Fear Questionnaire, Penn State Worry Questionnaire and Social Phobia an Anxiety Inventory," with M. Gillis, D. Haaga and A.F. Ford, *Psychological Assessment*, vol. 7, no. 4, pp. 450-455 (1995).
- 15) "Can Consumers Interpret Nutrition Information in the Presence of a Health Claim? A Laboratory Investigation," with M. Hastak, A. Mitra and D.J. Ringold, *Journal of Public Policy and Marketing*, vol. 15, no. 1, pp. 16-27 (1996).
- 16) "Informing Buyers of Risks: An Analysis of the Marketing and Regulation of All-Terrain Vehicles," with M.B. Mazis, *Journal of Consumer Affairs*, pp. 90-123 (Summer 1996).
- 17) "Can the Educationally Disadvantaged Interpret the FDA-Mandated Nutrition facts Panel in the Presence of an Implied Health Claim," with M. Hastak, A. Mitra and D. J. Ringold, *Journal of Public Policy and Marketing*, vol. 18, no. 1, pp. 106-117 (Summer 1999).

- 18) "Consumer Search for Information in the Digital Age: An Empirical Study of Pre-Purchase Search for Automobiles," with L. Klein, *Journal of Interactive Marketing*, vol. 17, no. 3, pp. 1-22 (Summer 2003).
- 19) "Application of Research on Consumer Complaint Rates to the Estimation of the Financial Impact of Prospective Product Defects," (with D. Scheffman and D. Weiskopf), *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior*, (Fall 2004)
- 20) "The Impact of the *Daubert* Decision on Survey Research Used in Litigation," *Journal of Public Policy and Marketing*, forthcoming, Fall 2005.

Refereed and Special Session, Proceedings Publications

- "A Multivariate Investigation of Market Structure," refereed, *Combined Proceedings of the American Marketing Association*, pp. 177-182 (1974).
- "The Status of Consumer Behavior: Some Empirical Perspectives," with P.G. Kuehl and R.F. Dyer, refereed, *Advances in Consumer Research*, vol. 2, pp. 51-61 (1975).
- "Classifying and Measuring Deceptive Advertising: An Experimental Approach," with P.G. Kuehl and O. Reksten, refereed, *Combined Proceedings of the American Marketing Association*, pp. 493-497 (1975).
- "Public Policy, The Sherman Act and the IBM Antitrust Case," with B.T. Ratchford, refereed, *Combined Proceedings of the American Marketing Association*, pp. 593-596 (1975).
- "A Functional Analysis of Macro and Micro Marketing Systems," with W. Nickels, referred, *Proceedings of the Southern Marketing Association*, pp. 76-79 (1975).
- "Measuring the Impact of Consumer Survival Kit: Some Preliminary Results," with P.N. Bloom and J.W. Harvey, refereed, *Advances in Consumer Research*, vol. 3, pp. 388-391 (1976).
- "Consumer Research and Public Policy Formation: The Case of Truth in Contributions," with P.G. Kuehl and P.N. Bloom, refereed, *Combined Proceedings of the American Marketing Association*, pp. 445-450 (1976).
- "An Assessment of the Consumer Protection Act of 1975," refereed, *Combined Proceedings of the American Marketing Association*, pp. 209-212 (1976).
- "A Multivariate Analysis of State Consumerism Policy," refereed, *Proceedings of the Annual Meeting of the American Institute for Decision Sciences*, pp. 211-213 (1976).
- "The Promotion of Medical and Legal Services," with P.G. Kuehl, refereed, *Proceedings of the American Marketing Association*, pp. 39-44 (1977).
- "Consumer Protection Agencies: Their Budgets and Activities," refereed, *Proceedings of the American Marketing Association*, pp. 93-96 (1978).
- "Box-Jenkins Analysis of a Retail Sales Intervention," with F.B. Alt, refereed abstract, *Northeast Aids Proceedings*, pp. 28-32 (1979).
- "The Industrial Marketing Implications of Organizational Hierarchy Within Purchasing Departments," with R.E. Spekman, refereed, *Proceedings of the American Marketing Association*, pp. 178-181 (1981).
- "Consumer Research Issues at the Federal Trade Commission," with J. Calfee and T. Maronick, refereed, *Advances in Consumer Research*, vol. 19, pp. 263-267 (1983).
- "Consumer Psychology Research Needs at the Federal Trade Commission," with J. Calfee, refereed, *Proceedings of the Division of Consumer Psychology*, American Psychological Association, pp. 118-122 (1984).

- "Market Forces, Information and Reduced Flammability Cigarettes," with J. Calfee, Special Session, *Advances in Consumer Research*, vol. 14, pp. 274-278 (1987).
- "An Empirical Test of the Search, Experience and Credence Attributes Framework," with D.B. Smith and J. Swasy, special session, *Advances in Consumer Research*, vol. 15, pp. 239-243 (1988).
- "Economics, Information and Consumer Behavior," with J. Calfee, special session, *Advances in Consumer Research*, vol. 15, pp. 234-238 (1988).
- "Cigarettes in the Popular Press, 1930-1960: Preliminary Research," with D.J. Ringold and M. Rogers, special session, *Advances in Consumer Research*, vol. 17, pp. 467-473 (1990).
- "Regulation of Advertising in the European Economic Community: An Overview," special session, *European Advances in Consumer Research*, vol. 1, pp. 559-564 (1993).
- "Consumer Search for Information in the Digital Age: an Empirical Study of Pre-Purchase Search for Automobiles" (with Lisa Klein) *Advances in Consumer Research*. (2001).

Articles in Books

- 1) "Problems in Education and Training in Marketing and Marketing Research in Information Science," with P. Wasserman, *Education and Training: Theory and Provision*, Federation International De Documentation: The Hague, pp. 105-112 (1979) (a different version of the *Journal of Library Administration* article).
- 2) "Label Warnings in OTC Drug Advertising: Some Experimental Results," with P.G. Kuehl, *Current Issues and Research in Advertising*, J.H. Leigh and C.R. Martin (eds.), Univ. of Michigan Press: Ann Arbor, pp. 115-130 (1979).
- 3) "Using Marketing Techniques to Increase Immunization Levels: A Field Experiment," with R.E. Spekman, *Exploring and Developing Government Marketing*, S. Permut and M. Mokwa (eds.), New York, Praeger Press, pp. 304-317 (1981).
- 4) "The FTC's Product Defects Program and Consumer Perceptions of Product Quality," with J. Calfee, *Perceived Quality*, J. Jacoby and J. Olson (eds.), Lexington, Massachusetts, Lexington Books, pp. 175-191 (1985).
- 5) "The Economics of Information: Research Issues," with D.B. Smith and J.L. Swasy, *Marketing and Advertising Regulation: The Federal Trade Commission in the 1990s*, P. Murphy and W. Wilkie (eds.), pp. 300-312 (1990).

Books Edited

- 1) *Marketing and the Library*, New York, Haworth Press (1984).
- 2) *AMA Educators Proceedings*, co-edited with R.L. Lusch, G.L. Frazier, R.D. Howell, C.A. Ingene, M. Reilly and R.W. Stampf, Chicago, American Marketing Association, 403 pages (1985).
- 3) *AMA Educators Proceedings*, co-edited with S.P. Douglas, M.R. Solomon, V. Mahajan, M.I. Alpert, W.M. Pride, G.L. Frazier, J.C. Anderson and P. Doyle, Chicago, American Marketing Association, 287 pages (1987).

Research Reports

- 1) "A Study of Parks, Recreation and Open Space in Prince George's and Montgomery Counties, Maryland," with R.W. Janes and P.G. Kuehl, for Maryland National Capital Park and Planning Commission, 253 pages (1975).

- 2) "A Feasibility Study to Identify Methods to Increase the Levels of Immunization of Children Receiving Services from BCHS Funded Clinics," with R.E. Spekman, prepared for Bureau of Community Health Services, D.H.E.W., 97 pages (1979).
- 3) "The Effects of Reduced Flammability Cigarettes on Smoker Behavior," with J.P. Brown and J.E. Calfee, prepared for the National Bureau of Standards, 65 pages (October 1986).
- 4) "Final Report on Undercover Investigation of ATV Dealers," prepared for Consumer Product Safety Commission, 53 pages (1989).

PRESENTATIONS

"The Role of Dispute Mediation in Consumer Protection," presented at Meetings of the Practicing Justice Institute, Marymount College, New York City (1978).

"The Use of Consumer Research in the Bureau of Economics, FTC," presented at Association for Consumer Research Conference, San Francisco (1979).

"The FTC's 1983 Deception Policy Statement," presented at Southern Marketing Association (November 1984).

Proposed, organized and chaired special session on "FTC Policy Toward Deception," at Association for Consumer Research Conference, Washington, D.C. (1984).

As faculty member at AMA Doctoral Students Consortium at Notre Dame, presented "Economics of Information, Advertising and Public Policy (1986) (same session was repeated at 1987 Consortium at NYU).

Proposed, organized and chaired special session on "Cigarettes and Regulation: Unintended Consequences?" at Association for Consumer Research Conference, Toronto (1986).

"An Economics of Information Approach to the Regulation of Advertising," with J. Calfee, Winter Educators Conference of the American Marketing Association (1988).

"Signals in Advertising: Preliminary Results," with D.B. Smith and J.L. Swasy, special session, Winter Educators Conference of the American Marketing Association (1991).

"Content Analysis of Advertising for All-Terrain Vehicles, 1980-1987," presented to the marketing faculty at INSEAD, Fontainebleu, France and to marketing faculty at Catholic University at Leuven (1992).

"Can Consumers Interpret Nutrition Information in the Presence of a Health Claim? A Laboratory Investigation," with M. Hastak, A. Mitra and D.J. Ringold, presented at the Annual Meeting of the Association for Consumer Research (1993).

"Interpretation of Health Claims and Nutrition Information by Disadvantaged Consumers," with A. Mitra, M. Hastak and D.J. Ringold, presented at the Annual Meeting of the Association for Consumer Research (1994).

"The Effects of Health Claims on Consumer Interpretation of FDA-mandated Nutrition Disclosures: a Mall Intercept Study," with M. Hastak, A. Mitra and D.J. Ringold, presented at the Annual Marketing Association Public Policy Conference (1997).

"Regulation of Advertising on the Internet," with J. Calfee, presented at the Annual American Marketing Association Public Policy Conference (1997).

"Consumer Search on the Internet," with Lisa Klein, presented at the Annual American Marketing Association Public Policy Conference (1999).

"Consumer Search on the Internet: Predictions from the Economics of Information," with Lisa Klein, presented at the Annual Meeting of the Association for Consumer Research (1999).

"Philosophy of Science and the Supreme Court: The Impact of the *Daubert* Decision on Survey Research Used in Litigation," presented at Kenan-Flager School of Business, UNC at Chapel Hill (Fall 2002) and Marketing Faculty Consortium at Georgetown University (April 2003)

"Philosophy of Science and the Supreme Court: The Impact of the *Daubert* Decision on Survey Research Used in Litigation," presented at the Annual American Marketing Association Public Policy Conference (2003).

CURRENT RESEARCH INTERESTS

Ford, Hastak, and Mitra are completing third study of health claims in food advertising.

PROFESSIONAL ACTIVITIES/MEMBERSHIPS

Manuscript reviewer for the American Marketing Association Educators' Conferences, 1976-present; Southern Marketing Association Conferences, 1977-1978; *Journal of Marketing*, 1979-1981, 1999-2001; *Journal of Business Research*, 1980; Association for Consumer Research Conferences, 1980, 1982, 1983, 1985-1990, 1999-2000 and *Journal of Consumer Research*, 1987-1992, 1995, 1997-2001, *Journal of Marketing Research*, 1997-2000, *Journal of Consumer Psychology*, 1999.

Reviewer for AMA Dissertation Competition, 1983, 1987, 1995. Proposal reviewer for the National Science Foundation, the Ford Foundation and the Department of Energy.

Discussant at AMA Consumerism Workshop, 1976; Southern Marketing Association Conference, 1977; American Marketing Association Educators' Conference, 1978-1980; Association for Consumer Research Conference, 1978-1980; AMA Professional Services Marketing Conference, 1981 and Public Policy Conference, 1993, 1994, 1995, 1997.

Member of Program Committee, Association for Consumer Research meeting, 1980, 1984, 2000.

Co-Chairman of AMA Doctoral Students Consortium, 1981.

Faculty participant at AMA Doctoral Students Consortium, 1980, 1986 and 1987.

Elected to Board of Directors, Association for Consumer Research, 1982-1985.

Editorial Review Board, *Journal of Marketing*, 1982-1997.

Editorial Review Board, *Journal of Public Policy and Marketing*, 1983-present.

Special Editor, Marketing and Information Science Issue, *Journal of Library Administration*, 1983-1984.

Public Policy Track Chairman, Educators' Conference of the American Marketing Association, 1985, 1987, 2001.

Book Review Editor *Journal of Public Policy and Marketing*, 2001 to 2004.

GRANTS, CONTRACTS AND AWARDS RECEIVED

Received competitively-bid contract from the Maryland National Park and Planning Commission for *A Survey of Parks, Recreation and Open Space in Prince George's and Montgomery Counties, Maryland*, with R.W. Janes and P.G. Kuehl, \$33,878 (Spring and Summer 1975).

Received contract from National Institute of Health to develop curriculum for a two-day Cancer Communications Marketing Seminar, \$8,000 (Summer 1978).

Received contract for "A Feasibility Study to Identify Methods to Increase the Levels of Immunization of Children and Adolescents Receiving Services from BCHS Funded Clinics," with Robert Spekman, from Bureau of Community Health Services, DHEW, \$9,972 (Fall 1998).

Received contract for "The Effects of Reduced Flammability Cigarettes on Smoker Behavior," with John P. Brown, from Consumer Product Safety Commission and National Bureau of Standards, \$19,925.

Course Release, Senate Research Committee, American University (Spring 1987 and Spring 1988).

Summer Research Grants, Kogod College of Business Administration, American University (1986 and 1987).

Received award for "The Effects of New Food Labels on Disadvantaged Consumers," with M. Hastak, A. Mitra and D. Ringold, from Marketing Science Institute, \$26,000 (1993) (proposal was one of six funded out of 45 entries in MSI "Using Research to Help Society Competition").

Listed as one of "The Best Researchers in Marketing," *Marketing Educator*, p. 5 (Summer 1997).

CONSULTING WORK

American Automobile Association
Organization of American States
Instituto De Investigaciones Electricas, Mexico
Dames and Moore, Inc.
Public Broadcasting System

EXPERT AND EXPERT WITNESS ASSIGNMENTS SINCE 2001

Good v. Broyhill
Bradley, Arant, Rose and White (2001)
Trial testimony
National Association of Optometrists & Opticians v. Lockyer
Morrison & Foerster (2003)
Expert report, deposition
Hispanic Broadcasting Corp. v. Educational Media Foundation
Kenyon & Kenyon (2003)
Expert Report
Cass. v. AmeriDebt et al.
Collier Shannon (2004)

Expert Report, deposition
Diarama Trading Company v. J.Walter Thompson and others
Kenyon and Kenyon (2004)
Expert Report, deposition
Gardner and Blangeres v. Stimson Lumber Company
Steven H. Gurnee & Associates (2004)
Deposition, declaration, trial testimony
Pharmavite , LLC v. Weider Nutrition Group, Inc. et al.
Blakely, Sokoloff, Taylor & Zafman (2004)
Expert Report (with Michael Mazis), deposition
Government Employees Insurance Company v. Google, Inc. and
Overture Services, Inc.
Arnold & Porter, LLP (2004)
Expert Report, deposition, trial testimony
Minnesota Mining & Manufacturing Company v. Saint Gobain
Arnold & Porter, LLP (2005)
Expert Report

THESIS COMMITTEES

Chairman of dissertation committees for George Coan, Dennis Pitta, Debra Ringold and Darlene Smith.

Member of dissertation committee for Bill Grazer, Michael McGinnis, Dennis McDonald, Frank Franzak, Ronald Hill and Dennis McDonnell.

COMMITTEE SERVICE AT AMERICAN UNIVERSITY

Kogod College Rank and Tenure Committee (1987-1988, 1995-1998, 2004-present)
Faculty Senate Research Committee (1985-1989)
Marketing Department Faculty Recruiting Committee (1985-present)
Advisory Board, American Studies Department (1986)
Ad hoc Research committee, KCBA (1986-1989)
Committee on Faculty Relations (1988-1989)
Deans Cabinet (1989-1994, 1999-2001, 2004)
Executive Committee of the AU Chairs (1993-1994)
AU Presidential Search Committee (1993-1994)
President's Committee on Strategic Planning (1995-1997)
AU Provost's Committee on Academic Programs (1995-1997)
Director of MBA Field Studies (1995-1997)
Chair of Executive Education Committee (1998)
Women's Varsity Soccer Coach Search Committee (2000)
Faculty Advisor Men's Soccer (2002 to present)
Associate Dean Search Committee, KSB, (2003)

UNDERGRADUATE COURSES TAUGHT

"Principles of Marketing"
"Marketing Research Methods"
"Fundamentals of Marketing and Business for Communications"

GRADUATE COURSES TAUGHT

"Marketing Research Methods"
"Doctoral Seminar in Marketing and Public Policy"

“Research Methodology for Doctoral Students”
“Consumer Behavior”
“Marketing Management”

Target Research Group

Target Research Group Inc. (TRG), located in Nanuet, New York, is a high quality, full-service market research company providing design, execution, data processing and analytical services.

Since its founding in 1986, the company has grown each year, and is now considered a medium sized research company with 20 full-time employees. All aspects of the research process are conducted and/or managed in-house: printing, shipping, programming of computer-assisted questionnaires, data processing and analysis. TRG is part of The MVL Group, located in Jupiter, Florida, which also consists of our sister companies, Quicktest/Heakin Mall Network, Discovery Research Telephone Facility, and Quick Tech Online who provide us with data collection.

TRG is considered a value-added research company focusing on a small number of clients, providing a high level of research experience for each project. TRG's senior staff averages 30 years of research experience.

Target Research Group has expertise in concept, product, advertising, and package testing, as well as strategic research for food, personal care, other CPG companies, legal, financial, and publishing industries.

TRG works with a wide variety of research users, including Marketing Research, R&D Consumer Research, Corporate Management, Advertising Agencies, Law Firms and Academia.

Over the years, TRG has developed a number of proprietary research techniques:

- Ad Trac(tm) - Advertising Evaluation System
Evaluates TV and Print advertising for impact, persuasion, and communication. Normative database available for comparison.
- Con Trac(tm) - Concept Screening
Cost effective and highly discriminating concept screening technique with "Strength Index" measure.
- Fore Trac(tm) - Forecasting/Modeling
Sales forecasting of new products/line extensions/relaunches. Utilizes a unique competitive "evoked set" environment.
- Power Trac(tm) - Concept & Product Optimizer
Provides insight into how to maximize concept acceptance and product retention. Identifies key motivations and their importance. A simple add-on to any concept or product test.
- Price Trac(tm) - Pricing Optimization Model
Identifies optimal pricing for new products to maximize sales and profitability. Utilizes respondent's own "evoked set".
- BAC Trac(tm) - Better Access to Consumers

Utilizes IVR technology and instantaneous incentivization to survey hard to reach consumers.

- BAC Check(tm) - Better Access to Consumers
Utilizes a check to survey hard to reach consumers, and build a database of purchasers.

TRG provides superior client service because of the following:

- Attention to quality
- Membership of the MVL Group to provide faster and less expensive data collection
- Seasoned research professionals
- Client service, not sales oriented

Lewis and Roca, LLP

One of the sponsors of the Digital Evidence Project Survey, the law firm of LEWIS AND ROCA was founded in Phoenix, Arizona in 1950. It is one of the Southwest's leading firms with more than 170 lawyers in offices in Phoenix and Tucson, Arizona; Las Vegas, Nevada, and Albuquerque, New Mexico. The firm serves a diverse base of local, regional, national and international clients including some of the world's largest corporations. Its mission is to provide the highest quality service in the most cost efficient manner.

The firm offers a full range of services with specialty practice groups in Appeals, Arbitration and Mediation, Banking, Commercial Finance, Bankruptcy, Construction, Corporate and Securities, Criminal Law, Electronic Discovery and Data Management, Energy, Environmental, Government Relations, Government Contracts, Healthcare, Hospitality Industry, Insurance Coverage and Regulation, Intellectual Property, Labor and Employment, Personal Injury, Product Liability, Professional Liability, Real Estate and Land Use, Taxation, Telecommunications, Trusts and Estates and Utility Regulation.

The firm's litigation practice includes some of the most experienced and highly respected trial lawyers in the Southwest. Lewis and Roca was chosen as a number one leading general commercial litigation law firm in Arizona by Chambers & Partners *Chambers USA: America's Leading Business Lawyers*, 2003-2004.

The firm's business lawyers are experienced in handling complex commercial transactions. Several attorneys have prior experience in industry and as certified public accountants.

Government affairs specialists have served in leading governmental positions with Arizona state agencies, the governor's office and the legislature.

Twenty-five Lewis and Roca attorneys are recognized in the current edition of *The Best Lawyers in America*, and over half have achieved *Martindale-Hubbell Legal Directory's* highest preeminent rating. Forty-five of our lawyers edited their school's law review or were elected to Order of the Coif.

Many of the attorneys in the firm hold leadership positions in legal organizations and have lectured and written extensively in their specialties. They are also leaders in civic, cultural and charitable organizations.

Through the firm's national and international contacts, we have access to the most qualified lawyers within and outside the United States and, when our clients need counsel outside Arizona, we are able to recommend counsel elsewhere in the United States and overseas.

Evidence Exchange

Background & Capabilities

One of the sponsors of the Digital Evidence Project Survey, Evidence Exchange has as its founders among the most experienced providers of Electronic Discovery (EDD) services. The firm's first projects in this area were in the late 1980's and by the mid-1990's, the firm was working full-time in the EDD area. Evidence Exchange, which is the successor of Prounis Consulting Group, has been operating since the summer of 1999. The firm provides a full range of electronic discovery services, including:

- > Data Collection
- > Tape Restoration
- > File Deduplication
- > Password Cracking
- > Data Mining, Filtering & Searching
- > Metadata Extraction
- > E-Mail Message & Attachment Parsing
- > Data Review Or Host Liaison Services
- > Native File Production
- > Native File Conversion To TIFF/PDF/Paper
- > Miscellaneous Database Work & Auto Coding Of E-Documents
- > Notarizing Native Files, PDF Files or Non-Standard Source Files (e.g., voicemail)

Evidence Exchange also consults on case strategy, e-document retention and document preservation issues. As consultants, the firm has negotiated on behalf of clients with governmental entities (i.e., on minimizing / refining electronic discovery & production obligations) and have also served as party-appointed "neutrals" in securities litigation.

Overview Of Our Technology (see www.evidenceexchange.com)

Evidence Exchange has developed the Secure Digital Photocopier (SDP) process, which takes electronic files of any format and converts them to readable, **searchable**, printable PDF files (or TIFF), while it fingerprints and digitally notarizes them so they are secure through the entire discovery process. The SDP can convert over 500 file types, including e-mail and attachments, business documents, presentations, photographs, calendars, schedules, forensic data and database files. Before archiving an original file to PDF, the SDP notarizes the original file and brands its PDF rendering with both fingerprints (i.e., generated by running MD5 and SHA-1 in parallel) using Surety's digital time stamping service. This secure process can detect alterations of a single bit of a file or of the timestamp associated with that file and provide proof against tampering and modification.

The SDP is an excellent documentation and deduplication tool. The SDP Service automatically documents the electronic data conversion methods used and provides complete chain-of-custody information that shows how the specific digital evidence has been handled during discovery. In addition, an SDP plug-in allows for authorized users to authenticate (i.e., validate the integrity of) digital files on the Web using Adobe Acrobat.

Navigant Consulting, Inc.

One of the sponsors of the Digital Evidence Project Survey, Navigant Consulting, Inc. (NYSE: NCI) is a specialized independent consulting firm providing litigation, financial, healthcare, energy and operational consulting services to government agencies, legal counsel and large companies facing the challenges of uncertainty, risk, distress and significant change. The Company focuses on industries undergoing substantial regulatory or structural change and on the issues driving these transformations.

Navigant Consulting's Discovery Services practice provides law firms and corporate legal departments with solutions for managing the risks and costs of large-scale litigation efforts. The practice has been engaged to provide consulting services to some of the largest companies and law firms in the United States and have experience in all phases of litigation, beginning with initial fact-finding and continuing through discovery, production, and trial preparation.

The practice has extensive, unequalled knowledge and experience in the design and management of discovery and production processes and systems. Clients have sought Navigant Consulting's expertise in high-stakes, high-visibility civil, class action, multi-party, and regulatory matters. The practice combines project management skills, technology expertise, and in-depth knowledge of legal processes to overcome the problems associated with large volumes of paper and electronic data that have to be reviewed and produced within stringent time frames.

Over the years, the practice has demonstrated the ability to coordinate effectively with multiple law firms and their clients to cost-effectively deliver high-quality services and results in the areas of document accumulation, electronic discovery, document review, and production. Clients have engaged Navigant Consulting to design and implement discovery management systems in a substantial number of complex, high-stakes, high-visibility matters. The practice is able to provide effective and diligent management and a "ready reserve" of talented staff to perform at the direction of counsel in any of the following ways:

- Identifying the locations of potentially relevant documents and electronic data
- Developing plans and procedures for discovering electronic data in conformance to current evidentiary rules and best practices
- Creating inventories of records, whether in paper or digital form
- Coordinating document imaging and coding suppliers and their operations
- Merging information from a number of sources and in a variety of formats into a single, coherent, automated system for managing document review and production
- Managing relevancy and privilege reviews and coordinating the creation of privilege logs
- Assisting in fact-finding and issue development
- Creating deposition and trial witness packages
- Managing centralized document repositories, including web-centered repositories