



# **ASU-Arkfeld** **eDiscovery and** **Digital Evidence** **Conference**

**March 13-15, 2013**

**Sandra Day O'Connor College of Law / Armstrong Hall**  
**Arizona State University / Tempe campus**

CENTER FOR

**Law, Science & Innovation**

**ASU** SANDRA DAY O'CONNOR  
COLLEGE of LAW  
ARIZONA STATE UNIVERSITY

11:30 a.m.–12 p.m. / Check in

12–12:30 p.m. / Welcome and introduction

Access to Justice: Is Digital Information the Solution or the Problem?

Step back – has the movement to digital evidence, and myriad legal and IT issues that accompany the transition, provided greater access or diminished access to justice? Have issues such as legal holds, big data, metadata, computer-assisted search, “not reasonably accessible,” proportionality, and sampling enhanced or provided additional obstacles to our justice system? This session will examine a macro picture of the transition to digital evidence and what it portends for the justice system.

**Presenter:** Michael Arkfeld, Attorney, Arkfeld & Associates



Michael Arkfeld

12:30–1:30 p.m. / Joint session

Litigation Holds – Know When to (Litigation) Hold ‘em, Know When to Fold ‘em (Ethics CLE)

Successful preservation of electronically stored information starts with the implementation and management of a litigation hold. This session will discuss the challenges practitioners face identifying the triggering event (with special attention focused on the Apple v. Samsung case), the scope of production, reducing the costs, and when it is safe to release the hold.

**Moderator:** Michael Arkfeld, Attorney, Arkfeld & Associates

Panelists

- Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court, District of Columbia
- Sean Gallagher, Shareholder, Polsinelli Shughart PC
- Caroline Mankey, Attorney, Cypress LLP
- Tom Morrissey, Sr. Director, IT Litigation, Purdue Pharma LP

1:35–2:30 p.m. / Breakout sessions

Around the World – Data Privacy Considerations for Global eDiscovery

Globalization has led to litigation that touches companies and employees around the world. But there is certainly no “easy button” to gathering information abroad or moving it overseas for discovery and trial. This session will explore the risks inherent in litigation-related data transfers from countries with strict data privacy laws.

**Moderator:** Browning Marean, Senior Counsel, DLA Piper

Panelists

- Robert Singleton, Principal, Squire Sanders
- Daniel Oseran, Privacy Counsel, eBay

Pulling the Curtain Back – A Detailed Look at eDiscovery Project Management

One of the most important, but often overlooked, aspect of eDiscovery, is the role of an effective project manager to oversee the production of electronically stored information. This session brings together a blend of seasoned project managers to talk about their roles and responsibilities and the best practices that underscore the importance of their work.

**Moderator:** Ron Sotak, Attorney, Ryley Carlock & Applewhite

Panelists

- Wendy Zerr Jackson, eDiscovery Program Manager, Banner Health System
- Stephen Goldstein, Director of Practice Support, Squire Sanders
- Mark Blaha, Director of Litigation Support Services, Littler Mendelson P.C.
- Brian Ingram, Litigation Technology & eDiscovery Consulting, LexisNexis

2:30–2:45 p.m. / Networking break

2:45–4 p.m. / Joint session

What We Have Here is a Failure to Communicate – Meet and Confer Essentials

Judges prefer them, many state courts encourage them, and the Federal Rules require them. Yet, many meet-and-confer conferences last far less than the court hearings that result from the parties’ failure to adequately discuss their respective electronically stored information legal and IT positions. This session presents a mock meet-and-confer session to encourage the meaningful exchange of ESI information, focusing on search protocol, privilege and cost-shifting issues, while respecting each lawyer’s duty of zealous advocacy.

**Moderator:** Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court, District of Columbia

Panelists

- Niloy Ray, eDiscovery Counsel, Littler Mendelson P.C.
- Scott Kane, Partner, Squire Sanders

4:10–5:15 p.m. / Breakout sessions

Tossing Bills in the Fountain – eDiscovery Economics

New tools abound, but the cost of eDiscovery continues to rise as does the size of the overall population of data reviewed and produced in discovery. This session provides an overview of the economics of eDiscovery and provides strategies to reduce data populations and control rising costs.

**Moderator:** Scott Kane, Partner, Squire Sanders

Panelists

- Mark Sidoti, Attorney, Gibbons P.C.
- Paul Armbruster, Senior Litigation Paralegal, eBay
- Karl Wetzel, Vice President/Director, VeDISCOVERY

Information Governance – Controlling the Overgrowth of Data

The key to controlling eDiscovery costs begins well before litigation hits. Indeed, the cost of eDiscovery is directly tied to the amount of information that is collected, processed and reviewed. This session explores the importance of document retention and destruction policy implementation and compliance.

**Moderator:** Lorrie Luellig, Of Counsel, Ryley Carlock & Applewhite

Panelists

- Fritz Beeson, Senior Director, Legal Services – Litigation, Salt River Project
- Tom Morrissey, Senior Director, IT Litigation, Purdue Pharma LP
- Blake Richardson, Manager of Records, Safeway Inc.
- Doreen Fox, IRM Specialist and Trainer, Pinnacle West Capital Corporation



7:30–8 a.m. Continental breakfast and check in

8–8:15 a.m. Review and introduction of keynote speaker

8:15–9 a.m. Keynote address

Halls of Justice: Only Rich and Poor Need Apply

One of the major factors forcing medium size cases into settlement (regardless of merit) is the exorbitant costs associated with going to trial – and more precisely the costs of discovery. Magistrate Judge John M. Facciola, one of the leading judges on eDiscovery topics, discusses factors driving up the cost of trial and why true reform to the Federal Rules is the best solution to overcoming those factors and opening the doors of the federal courts to a larger segment of the aggrieved.

Speaker: Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court, District of Columbia



Hon. John M. Facciola

9:05–10 a.m. Breakout sessions

Social Media Discovery Considerations

Social media can be a critical source of discovery in some cases. But collecting and using social media web pages can be a trap for the unwary. This session provides insight and guidance into best practices and techniques for not only the collection of social media web pages, but also a detailed discussion of how best to authenticate the information for use at trial.

Moderator: Caroline Mankey, Attorney, Cypress LLP

Panelists

- Hon. Samuel Thumma, Judge, Arizona Court of Appeals
- Niloy Ray, eDiscovery Counsel, Littler Mendelson P.C.

eDiscovery Strategy for Solos and Small Law Firms

eDiscovery is not just an issue facing the large national law firms. Do solo practitioners and small law firms have the means, both in terms of both cost and human resources, to collect, process and review the electronic information of their clients and opponents in domestic relations and other types of cases? This session explores the atypical nature of eDiscovery, how lawyers at small firms are leveling the playing field, and different eDiscovery tools and their costs.

Moderator: James Hennenhoefer, Attorney, James A. Hennenhoefer, APC

Panelists

- Brad Holm, Managing Member, Holm Wright Hyde & Hays PLC
- Gordon Cruse, Attorney, Gordon Cruse Law

10–10:15 a.m. Networking break

10:15–11:30 a.m. Joint session

PART 1: Are we all Stuck in TAR?

With the exponential growth of data facing all corporations, Technology Assisted Review (TAR) continues to be an option to control costs associated with the discovery process. Part one of this two-part session will delve into TAR and developing a TAR Protocol: Seed Sets, Training Sets and Iterations.

Moderator: Matthew Clarke, Shareholder, Ryley Carlock & Applewhite

Panelists

- Scott Kane, Partner, Squire Sanders
- Maura Grossman, Litigation Counsel, Wachtell, Lipton, Rosen & Katz
- Mark Blaha, Director of Litigation Support Services, Littler Mendelson P.C.

11:30 a.m.–12:45 p.m. Lunch (provided)

12:45–2 p.m. Joint session

Proportionality, a View From All Sides

With the ever-increasing volume of electronic information, many litigants are looking to the court for relief from the staggering costs. But, when should the courts even consider allocating the costs among the litigants, or should the presumption remain that the producing party should bear the costs? Does it make a difference whether we are focusing on preserving ESI or whether we are processing and reviewing the data? See and hear how litigants from across the country view the proportionality argument, what the court will look for in a ruling on a motion to shift discovery costs, and their views on the future of proportionality.

Moderator: Sean Gallagher, Shareholder, Polsinelli Shughart PC

Panelists

- Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court, District of Columbia
- Paul Armbruster, Senior Litigation Paralegal, eBay
- William Butterfield, Partner, Hausfeld LLP

2:05–3 p.m. Breakout sessions

Using and Challenging Forensic Digital Evidence

This program focuses on the methods a party may use to prevent disclosure or access to ESI and the application of legal issues to discovery of forensic evidence. There are many ways to destroy, alter, restore, conceal and protect ESI – including anti-computer forensic techniques such as defragmenting, wiping or scrubbing. This session will explore the technological issues of computer forensics and the legal issues that are raised.

Presenters: Michael Arkfeld, Attorney, Arkfeld & Associates, and Craig Reinmuth, President, Expert Insights, P.C.

Criminal eDiscovery and Federal Investigations

While the Federal Rules of Criminal Procedure have not been amended to provide specific guidance on eDiscovery for criminal cases and federal investigations, courts have not been reluctant to take guidance from the civil rules when necessary. This session explores what courts and government agencies are facing with regard to criminal eDiscovery, and also looks at the issue from the view of the targets of these investigations.

Moderator: Sean Gallagher, Shareholder, Polsinelli Shughart PC

Panelists

- Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court, District of Columbia
- James Knapp, Assistant Attorney, U.S. Attorney’s Office, District of Arizona
- Sean Broderick, National Litigation Support Administrator, Office of Defender Services
- Daniel Regard, Managing Director, iDiscovery Solutions, Inc.

3–3:15 p.m. Networking break

3:15–4:15 p.m. Joint session

First, Do No Harm: Preserving and Collecting

This session explores the inherent legal and technological issues in preserving and collecting ESI. Why are the courts adamant about prohibiting self-selection of ESI by custodians, and what supervisory mandates are outside counsel faced with when confronting the collection of ESI?

Moderator: Robert Singleton, Principal, Squire Sanders

Panelists

- Browning Marean, Senior Counsel, DLA Piper
- William Butterfield, Partner, Hausfeld LLP
- Mark Sidoti, Attorney, Gibbons P.C.
- Brandon Colburn, Vice President of eDiscovery Development, TERIS

# Day 2 / Thursday, March 14, 2013 (cont.)

## 4:20-5:30 p.m. Joint session

### PART 2: TAR – Not as Sticky as it Appears

With a basic understanding of TAR, part two of the series focuses on creating a TAR process through best practices, metrics and measures that will allow you to validate and defend your TAR process.

**Moderator:** Matthew Clarke, Shareholder, Ryley Carlock & Applewhite

#### Panelists

- Mark Blaha, Director of Litigation Support Services, Littler Mendelson P.C.
- William Butterfield, Partner, Hausfeld LLP
- Maura Grossman, Litigation Counsel, Wachtell, Lipton, Rosen & Katz

## 5:30-7 p.m. Reception

# Day 3 / Friday, March 15, 2013

## 7:30–8 a.m. Continental breakfast and check in

## 8–8:15 a.m. Review and introduction of keynote speaker

## 8:15–9 a.m. Keynote address

### Where, oh Where, have the Trials Gone?

It is well documented that the number of cases that are tried in courts across the country is declining. What part, if any, does the transition to ESI and implementation of new ESI procedural rules play in this decline? Have we turned into a cadre of attorneys who no longer focus on trials, but on depositions, document productions and motions for sanctions? Has the mindset of the “litigator” shifted from a focus on the trial, to a focus on pretrial maneuverings? Are we no longer willing to ask a jury or fact finder to decide the case? Does this affect our preoccupation with the discovery of ESI, and the decline of trials? Judge Shaffer will explore these novel, yet critical issues, in his keynote focusing on what role, if any, ESI may play in the decline of trials.

**Speaker:** Hon. Craig Shaffer, U.S. Magistrate Judge, U.S. District Court, District of Colorado



Hon. Craig Shaffer

## 9:05–10 a.m. Joint session

### The Weakest Link: Achieving Global Competency in eDiscovery

It would seem unthinkable for a lawyer to walk into court without a basic understanding of trial advocacy. However, a troubling percentage of lawyers are operating well below the standards of eDiscovery practices. This session explores a lawyer’s obligation under Rule 1.1 of the ABA Model Rules of Professional Conduct (and the recently adopted ABA Comments as to the “benefits and risks of technology”), and its state counterparts which require a lawyer to provide “competent representation,” which necessarily includes a basic understanding of eDiscovery rules and best practices.

**Moderator:** Michael Arkfeld, Attorney, Arkfeld & Associates

#### Panelists

- Lynda Shely, Attorney, The Shely Firm, PC
- Stephanie McCoy Loquvam, Attorney, Aiken Schenk Hawkins & Ricciardi P.C.

## 10:05–11 a.m. Joint session

### Judicial Roundtable, “Open Mic Edition”

eDiscovery conferences often feature judges in an informal setting discussing the cases and topics that are at the forefront of thought leadership. However, in many instances, there is little time to probe issues raised by audience members whose experiences may offer a unique, if not unaddressed, perspective. This session will feature a “hot microphone” where attendees can dialogue with the judges and discuss what they are seeing generally in their own practices (no war stories, please).

**Moderator:** Ken Withers, Director of Judicial Education and Content, The Sedona Conference

#### Panelists

- Hon. Craig Shaffer, U.S. Magistrate Judge, U.S. District Court, District of Colorado
- Hon. David Campbell, U.S. District Court Judge, U.S. District Court, District of Arizona
- Hon. Scott Bales, Justice, Arizona Supreme Court

## 11–11:15 a.m. Networking break

## 11:15 a.m.–12 p.m. Breakout sessions

### ESI in ADR - When the FRCP do not Apply

Alternative dispute resolution is traditionally touted as a more effective and cost-efficient means of resolving disputes. However, although discovery in ADR is more limited than in traditional litigation, it still often involves electronic discovery. How are ADR forums handling electronically stored information? Hear from distinguished neutrals regarding common practices, pitfalls and recommendations for managing electronic information (and discovery processes) in ADR.

**Moderator:** Paul Burns, Senior Counsel, Procopio, Cory, Hargreaves & Savitch LLP

#### Panelists

- Bruce Meyerson, Mediator and Arbitrator
- Dan Regard, Managing Director, iDiscovery Solutions, Inc.

### Discovery Considerations for Personal and “BYOD” Devices

As the business technology of yesterday becomes a daily accessory for consumers, it is no surprise that more discoverable information is being created on personal rather than business devices. This, together with corporate “Bring Your Own Device” (“BYOD”) policies that encourage workers to use their own devices to conduct business, has blurred the lines between data which is owned and managed by the company, and that which is in the possession, custody and control of the employee (or in some cases former employee). This session tackles the difficult issue of how best to preserve and produce data on personal and BYOD devices.

**Moderator:** Cecil Lynn III, eDiscovery Counsel, Littler Mendelson P.C.

#### Panelists

- Mark Sidoti, Attorney, Gibbons P.C.
- Anthony Lowe, Managing Attorney, Freddie Mac

## 12:05–12:55 p.m. Case Law Update

This panel provides an update on the ever-evolving case law related to electronic discovery. Extrapolating from this discussion will be a future look at possible trends in eDiscovery law and technological advancements.

**Moderator:** Cecil Lynn III, eDiscovery Counsel, Littler Mendelson P.C.

#### Panelists

- Hon. Craig Shaffer, U.S. Magistrate Judge, U.S. District Court, District of Colorado
- Michael Arkfeld, Attorney, Arkfeld & Associates

## 12:55–1 p.m. Closing remarks

# thanks to our sponsors

Tera



LexisNexis® Litigation Solutions



Giga



Kroll Ontrack®

Lunch Sponsor



Mega



Legal Hold Pro™  
A ZAPPROVED PRODUCT

Program Sponsor



**ASU** SANDRA DAY O'CONNOR  
COLLEGE of LAW  
ARIZONA STATE UNIVERSITY

P.O. Box 877906 • Tempe, AZ 85287-7906  
480.965.6181 • [law.asu.edu](http://law.asu.edu)

Information is subject to change. ASU is an affirmative action/equal opportunity institution. For ASU's non-discrimination policy, visit [www.asu.edu/titleIX](http://www.asu.edu/titleIX). © 2013 Arizona Board of Regents for the Sandra Day O'Connor College of Law. Published March 2013.