

Wednesday, October 28, 2020

12:00 — 12:15 **Welcome and Announcements**  
(Craig Weinlein, Kevin Brady, Martin Tully)

12:15 — 1:45 **[Session 1] Social, Technological, and Ethical Challenges of Electronic Evidence in Criminal Cases**  
(Judge Anthony Edwards, Andrew Goldsmith, Del Kolde, Judge Barbara Lynn, Michael Oppenheimer, Niloy Ray\*)

Events of 2020 have brought into sharp focus the importance of electronic evidence in law enforcement, criminal defense, and related civil rights litigation. Electronically stored information (ESI) generated by 911 calls, police body cams, news media coverage, bystanders' cell phones, surveillance cameras, social media postings, text messages, law enforcement databases, third-party geolocation records, and more provide rich sources of evidence for both prosecutors and defendants. But these new sources of ESI come with new social, technological, and ethical challenges for their preservation, production, and use at trial, including:

- The fundamental duty of technical competence (MRPC 1.2, Comment 8)
- The duty of diligent representation (MRPC 1.3, Comment 1)
- The confidentiality of information (MRPC 1.6, Comments 18 and 19)
- The duty of candor towards the tribunal (MRPC 3.3)
- Respect for the rights of non-parties (MRCP 4.1 through 4.4)
- Proper supervision of associates and legal support personnel (MRCP 5.1 through 5.3).

A panel of experienced criminal justice professionals, including a state prosecutor, federal defense attorney, state trial judge, and federal trial judge, will discuss cases taken from current headlines and provide advice for effective, ethical, and socially responsible advocacy.

**Required Materials**

- 1.1 Criminal e-Discovery: A Pocket Guide for Judges
- 1.2 Social, Technological, and Ethical Challenges of Electronic Evidence in Criminal Cases: Relevant Model Rules of Professional Responsibility

**Recommended Materials**

- 1.3 Recommendations for Electronically Stored Information (ESI) Discovery Production in Criminal Cases
- 1.4 Guidance for the Provision of ESI to Detainees
- 1.5 ESI sources and file type examples in small, medium, and large federal criminal cases

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1:45 — 2:00 Break

2:00 — 3:00 [Session 2] Case Law Review: Significant eDiscovery Decisions from 2020

(Ken Withers\*, Judge Childs, Judge Goddard, Tim Opsitnick, Judge Peck.)

The courts may have been physically closed for much of 2020, but civil litigation continued and the volume of decisions on eDiscovery hardly abated. The issues are the same: preservation, proportionality, process, production, privilege, post-judgment costs. Add to this “P” soup: discovery from nonparties, novel forms of electronically stored information, technology-assisted review, and the specter of sanctions. Veteran eDiscovery storm-chaser Ken Withers is joined by a panel of dialogue leaders who will highlight 20 significant court decisions from 2020 that every eDiscovery litigator needs to know.

**Required Materials**

2.1 Selected eDiscovery Court Decisions, October 16, 2019—October 15, 2020

**Recommended Materials**

2.2 Amended Rule 37(e) Case Summaries

3:00 — 4:00 [Session 3] Discovery From Third-Party Apps

(Greg Kohn\*, Sean Cotulla, Warren Kruse, Paul McVoy, Judge Mix.)

The explosion of social media applications, the internet of things, and other mobile device applications has created the ability of users to have new technologies and communication tools at their fingertips. People now have the ability to create endless amounts of data, interact with numerous devices from anywhere, and be tracked by their device and its applications. This presents numerous issues in civil and criminal litigation. Attorneys must now ask “What data exists?,” “How do we find it?,” “Is it discoverable?,” and “How do we collect it?” The answer is not always apparent. There is little guidance regarding how courts should treat discovery from third-party applications outside of the social media context. This panel will address how to obtain discovery from third-party applications, the difficulty in obtaining that discovery, and if different rules apply to discovery from third-party applications.

**Required Materials**

3.1 Your Employee May Be Wearing His Alibi—Or Your Evidence

3.2 PPT Emoji Comparison

**Thursday, October 29, 2020**

12:00 — 1:00 [Session 4] Our Quest for Best Practices and Uniformity in Filing ESI Under Seal

(Brian Clark\*, Judge Bissoon, Bethany Caracuzzo, Judge Driscoll, Karen Mitchell, Tony Petruzzi, Jodi Munn Schebel)

The Federal District Courts differ significantly as to the procedures practitioners must follow in order to file documents under seal; variously applying the Federal Rules of Civil Procedure, local

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rules, e-filing procedures, and in some districts, judges' individual practice guides and standing orders, with no national uniformity. In many districts, the time and expense of complying with the requirements are burdensome to both litigants and the courts. The Working Group has undertaken a survey of the various District Courts' approaches to filing ESI and documents under seal in an effort to develop a uniform rule on the procedures for filing under seal that lessens the burden and expense on both the courts and practitioners, and creates consistency between and among jurisdictions. The Working Group will provide its draft rule to the membership at the annual meeting for comments and feedback, and will also discuss the Working Group's ideas on a more comprehensive Commentary/Guide it is developing, which will incorporate the uniform rule and legal basis/guidance for its development, as well as provide an analysis of current caselaw and standards relating to the sealing of records.

**Required Materials**

- 4.1 Proposed Uniform Model Rule for the Sealing and Redacting of Information Filed with The Court

**1:00 — 2:00 Breakout Session: Reinventing the Privilege Log**

(Andrea D'Andra\*, Ellen Blanchard, Travis Brown, Jeannine Kenney, Judge Parker)

At the 2019 WG1 Annual Meeting, representatives of different constituencies led the dialogue to identify what is and is not working with the traditional process used for protecting privileged ESI from production. In part 2 of this series, we will explore alternatives to addressing privilege issues in discovery that are aligned with Federal Rule of Civil Procedure 1's mandate to "secure the just, speedy, and inexpensive determination" of every case. In conjunction with this session, WG1 solicited proposals on how to improve the privilege log process. Our dialogue leaders will evaluate the proposals in advance of the meeting and identify a select number of authors to present their ideas during this session.

**Recommended Materials**

- PL.1 The Privilege Log Three-Step  
PL.2 AI Privilege Logs  
PL.3 Ideas to Improve the Privilege Log Process

**2:00 — 2:15 Break****2:15 — 3:45 [Session 5] Voices from the Bench: Exploring the Judicial Perspective for 2020 and Beyond**

(Lauren Schwartzreich\*, Judge Bissoon, Judge Childs, Judge Driscoll, Judge Goddard, Judge Lynn, Judge Matthewman, Judge Mix, Judge Parker.)

2020, the year that proudly proclaims "hold my beer," has brought previously unfathomable changes to the court system and practice of law. Technology has at times degraded and yet saved the judicial system during this unprecedented period of remote work and virtual litigation. Reflecting back on the year-that-will-not-end, and looking to the future, this panel of remarkable federal and state court judges will explore the role of virtual litigation from the court's perspective

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and predict whether the mitigating role of technology and virtual litigation in the current pandemic will have long term implications for the court system.

### **Required Materials**

5.1 Jury Trials Case Study

### **Recommended Materials**

5.2 Court Operations and Proceedings During Coronavirus

5.3 Additional Resource List for Voices from the Bench: Exploring the Judicial Perspective for 2020 and Beyond

3:45 — 4:00 **Wrap-up**