

Surviving E-discovery: Rules and Realities

By Hon. Anthony J. Battaglia, United States Magistrate
Judge, Southern District of California¹



Hon. Anthony J. Battaglia

In little over a year since the implementation of amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information (“ESI”), lawyers and judges have struggled with these rules and the wide array of technologies. New issues arise daily and answers are being devised on a case by case basis. After a year of experience, it seems that certain core concepts and a veritable “top 10” list of techniques have emerged. These can be utilized to survive discovery in federal litigation. I do not mean survive in the T.V.

show “Survivor” construct of “outwit, outplay and outlast”, nor by the skin of your teeth standard. Survival in this instance should be measured as a competence to work within the rules in the best interests of your client. These techniques or tips are essentially a blend of the rules, realities and anecdotal experience of the author, following a review of developing case law and the experience gained in managing discovery issues in federal court.

ESI is critical in cases, since 95 percent of all business documents are created electronically, 75 to 80 percent of the data is never printed, and 70 percent of historic data is stored electronical-

(see “E-discovery” on page 8)

A Tribute to Joseph “Jay” Wheeler

By Jill Sullivan, Esq. of Chapin Wheeler LLP and Ken Fitzgerald, Esq. of Latham & Watkins LLP

Joseph “Jay” Wheeler, the co-founder of Chapin Wheeler LLP, passed away on January 17, 2008, at the age of 60. Before starting the Chapin Wheeler firm with his friend Ed Chapin, Jay was a senior trial lawyer at Latham & Watkins, where he served as the Chairman of the San Diego Litigation Department from 1996 to 2000.



Joseph “Jay” Wheeler

Jay was born on August 31, 1947 and was raised in South Dakota and Minnesota. He graduated from the United States Mili-

(see “Joseph “Jay” Wheeler” on page 7)

Inside

President’s Letter

Robin A. Wofford p. 2

She (Almost) Came in Through the Bathroom Window: The Stoneridge Decision Shuts Down Private Plaintiff “Scheme Liability”

Alan Schulman
and Nathan Karsgodt p.3

Inadvertently Produced Documents - What Do You Do If You Receive Them?

Erik S. Bliss p.4

Tips from the Trenches: The Inaugural Column

Mark C. Mazzarella p.5

Recent Developments in Summary Judgment

Charles S. Berwanger p.6

Joseph “Jay” Wheeler

continued from page 1

tary Academy at West Point in 1969 with a degree in Engineering. During his six years in the U.S. Army, he served in Vietnam as a military advisor to the South Vietnam army and was stationed for a time in Nuremberg, Germany. Upon returning to the United States, Jay served as Aide-de-Camp to General Henry Miley, Commanding General of the United States Army Materiel Command from 1973 to 1975. Jay’s value as a friend to many was reflected by the attendance of 21 of his West Point classmates at his memorial service in San Diego.

In the fall of 1975, Jay entered the University of Virginia School of Law, where he served as the Law Review Notes Editor in his second and third year. There, he met his future wife, Ann, also a student in the law school. Upon graduating in 1978, he served as Law Clerk to the Hon. Roger Robb, U.S. Court of Appeals for the District of Columbia circuit.

Jay moved to California in 1979 to take a position at Latham & Watkins in Los Angeles. Jay and Ann were married two years later in 1981, and celebrated their 26th wedding anniversary in September 2007. Jay relocated to the San Diego office of Latham & Watkins in 1982, where he became a senior partner and served as one of the firm’s principal trial lawyers.

While at Latham & Watkins, Jay tried a variety of business disputes to verdict, in areas of securities, antitrust, intellectual property, real estate, contract and employment law. He represented an impressive roster of clients, including Credit Suisse, ITT, Kodak, Signal, BAR/BRI Bar Review Course, and many others. He loved the courtroom, and was fearless about trying cases. He made innovative use of demonstrative exhibits, and although he prepared cases methodically and thoroughly, his demeanor before juries was calm and sincere. He loved taking complex cases and presenting them as basic human stories. His favorite beginning for an opening statement was: “Ladies and gentlemen, this is a simple case.”

Jay served on the Recruiting Committee at Latham & Watkins, and helped lure a large number of lawyers in San Diego’s legal community to our city. He was a thoughtful and patient

teacher, who held young lawyers to high standards, while trusting them to take on great responsibility early in their careers.

In February 2005, Jay and his friend Ed Chapin founded Chapin Wheeler, along with Jill Sullivan, one of the associates Jay had closely mentored at Latham & Watkins. During the almost three years Jay, Ed and Jill worked together, Jay was driven by his enthusiasm for representing plaintiffs and his continuing love of the law and cutting-edge legal arguments. His passion and humor were infectious, and the halls of Chapin Wheeler often rang with laughter. Jay’s relaxed intensity inspired everyone in the office to perform at their best, and simultaneously created an atmosphere of happiness and reassuring calm. He continued to teach and mentor, but also took great pleasure in learning new areas of the law and new strategies to best represent his clients. In his partnership with Ed, Jay was absolutely supportive, selfless and guileless. With clients and colleagues alike, Jay gave people his full attention so that everyone left his office feeling understood, energized and enlightened.

Jay was always willing to do the hard work himself. When associates had vacations to take, he made sure they took them, even when it meant that Jay was left doing legal research, writing briefs, and inspecting documents. He had a great sense of fun, played many practical jokes, and loved to laugh. He was serious about his craft, and about his cases, but he never took himself seriously. No matter how difficult the situation, he always exuded calm, and he was always able to find the humor in any circumstance. While waiting in the courtroom for oral argument, Jay frequently leaned over and whispered to the young lawyer waiting with him, “I have a brilliant idea,” raising his eyebrows and giving a knowing look and small smile. Jay’s brilliance, humor, and powerful but easy nature are and will be deeply missed. ▲