

CLE PROFILE

The Hon. John M. Facciola

Before *McPeek v. Ashcroft* arrived in his court more than five years ago, Magistrate Judge John M. Facciola (L'69) of the U.S. District Court for the District of Columbia hadn't had much reason to ponder the intricacies of electronic discovery. But Facciola will tell you that a good lawyer is always ready to learn, and after delving into the unique issues presented in *McPeek*, he came up with a novel solution that now guides courts across the country.

"I didn't sense at the time I wrote that opinion that what I was doing was anything all that significant," he says, "but apparently it seemed to mirror problems that were coming up in a highly computerized society."

McPeek involved a government official who alleged that he had been subject to retaliation after previous sexual harassment accusations he'd made against a bureau director became known to colleagues. The plaintiff's discovery request included not only readily available electronic records at the agency, but also backup data tapes that would require costly and time-consuming restoration and might not yield any relevant evidence. Noting the dearth of relevant precedent to guide him, Facciola decided to borrow from the economic concept of "marginal utility" and ordered, as he put it, "a test run" — a limited, initial backup restoration of one employee's e-mail messages sent and received over a one-year period. The results and expense of that search would determine whether a further search would be justified, and if so, which party should cover the costs. In the end, Facciola decided, more searching wasn't worth it.

"I didn't require any additional searching because the sorting didn't present the conclusion that it was likely that a more extensive search would yield more than we already knew," Facciola says. "And that's the

concept of marginal utility that got picked up in other cases."

Since *McPeek*, many courts have used the marginal utility idea to help them resolve vexing electronic discovery questions, and Facciola hasn't stopped thinking about the topic. He has participated in meetings addressing e-discovery amendments to the Federal Rules of Civil Procedure that take effect in December, has lectured and written extensively on the topic, and now serves on the advisory board for the Advanced E-Discovery Institute presented annually by Georgetown Law's Continuing Legal Education program. Facciola speaks at and helps plan the Institute, in which attorneys learn to navigate a range of electronic discovery issues, including when electronic information must be preserved; how to request such data under the discovery rules; how to deal with authentication, hearsay and other evidentiary issues; and how to format data to be turned over to the opposing party.

"The panels consist of people from all over the country who have thought about these issues and are well recognized," he says. "In the sense of the scope and quality of the panels, I think it's unique.... These are scholarly programs."

As a practical matter, Facciola says he has remained focused on electronic discovery because, as a magistrate judge, "we get more than the ordinary amount of discovery

work." But his involvement in the Institute also stems from a strong belief that good lawyers must be good students.

"Everyone who has practiced law for any period of time realizes that in many ways your education begins the day you leave law school," he says. "Like any profession, failing to keep up is disastrous. You can't reasonably expect clients to pay you good money if you don't know what's going on in vital areas — it's just inconceivable.... If you're not ready to learn on a daily basis in this dynamic society, you really have no business being a lawyer."

Facciola, who in the past has taught at Georgetown and continues to teach at Catholic University, also co-chairs Georgetown CLE's "Litigating Employment Cases: Views from the Bench" program. CLE programs, he says, "are absolutely crucial to the growth and development of the profession."

The employment program is especially helpful to practicing lawyers because it gives them an opportunity to hear from judges themselves what to do — and what not to do — when advocating on behalf of employees or employers. "It is the judicial perspective that brings people and keeps them coming," he says. "Apparently the audience is very hungry for that."

Facciola, who has been married to his wife, Gloria, for 26 years and has two grown children and three grandchildren, is an avid sailor and



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a member of a racing crew that sails on the Chesapeake Bay. The Brooklyn native loves sailing so much that he tries to include sailing metaphors in his writing whenever possible. A recent article he published on e-discovery and privilege waiver that appears in the *Federal Courts Law Review* is titled "Sailing on Confused Seas: Privilege Waiver and the new Federal Rules of Civil Procedure," and it tells the story of a fictional young associate who must cancel her weekend sailing plans when a discovery deadline approaches and she is called in to figure out how to mine a deluge of electronic data for privileged information.

As his *McPeek* decision and immersion into the subject of e-discovery show, Facciola welcomes opportunities to think about and resolve bewildering legal issues. "That's the great thing about being a judge," he says. "You never know what's going to come in the door."