

It's 2007, Do You Know Where Your Company's Electronic Data Is?

Since new Rules of Civil Procedure governing electronic discovery took effect on December 1 of last year, there has been a fair amount of uncertainty regarding just how profoundly they will affect the process of discovery in litigation.

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Because the new rules require litigants to discuss

location, retrieval and production of electronically stored information in the early stages of a case, what is becoming certain is that the new rules will require in-house attorneys and others involved in litigation to jump head first into the world of electronically stored information previously occupied by only by the IT department.

Unfortunately, many companies and their attorneys are not truly prepared for this leap. Ask yourself, "Could I, in the next 90-120 days, provide detailed information about all of the electronically stored information in my entire company?" "Could I swear to a court that the information is accurate and complete?" What if your entire case depended on your ability to do so? How certain could you be? Inside counsel must develop good answers to these questions in light of the growing number of cases in which courts have imposed sanctions on parties and their lawyers — ranging from monetary penalties, to adverse instructions, to entry of judgment — for failing to provide correct and complete information regarding their electronically stored information.

Those who will best equipped to handle the challenges of this type of discovery, and thus to avoid problems in court, are those that take the time to prepare now, before litigation is filed. The goals of preparation are both to enable a company to explain to the opposing party and to the court what information is available electronically and what technical issues are involved in retrieving it, and to ensure that the company itself is familiar with all of the possible locations of the information that will help prove its case.

An in-house attorney can relatively inexpensively begin preparing now. When compared to waiting until litigation is filed and the clock is running, preparation can help save

enormous outside counsel and vendor fees as well as litigation costs associated with discovery disputes, business disruption expenses and headaches. Preparation begins with two steps: 1. Identify the people within the organization who are familiar with the organization's electronically stored information, and 2. Ask the right questions.

Find the Right People to Talk to Within the Company

Finding the right people within an organization with which to discuss the company's current and historical computer hardware, software and data management is essential. In most companies, this search begins with the IT department.

Within the IT department the best source of information are those who work most regularly with company employees and their electronic data. These employees are more likely to know how people actually use the system and the various places people store electronic data everyday. The employee who routinely backs up the company's data is similarly best acquainted with that data and process. Remember, this person may not be the head of the department. The search should not stop the IT department. Rather, it is important to consider other employees with responsibility for certain information such as auditors, information security personnel, CIO or CFO, HR and legal staff who may have particular knowledge about where their specialized electronic information is stored.

While in the process of identifying company "experts" on electronically stored information, a company should identify a person capable of explaining the company's computer systems, storage, and backup procedures to outside counsel, to an opposing party, or to a court. Identifying and working with an employee who can explain the system, any technical issues and the burden presented by certain discovery may be useful in achieving more reasonable discovery requests from an opposing party or persuading a court to shift costs to the party seeking the discovery.

Ask the Right Questions

Identifying the appropriate people is just one aspect of preparing for electronic discovery — the other is asking the right questions.

The phrase “electronically stored information” has no universal meaning. Asking employees for “all electronic information” without an explanation is likely to lead to inconsistent results and missed information. To help clarify electronically stored information can be divided into three main categories — 1. Information employees can “touch,” 2. Information in the server environment, and 3. Information on backup media.

1. Information employees can “touch”

This is all of the files stored directly on an employee’s personal computer, PDA, external hard drives, flash/thumb drives, or any other media from which the employee can access the information directly. Locating all of this information entails asking each employee where he or she has stored any corporate information, files or data. It is easy to overlook this category especially if the company’s official policy requires employees to store corporate information only on corporate servers. People’s tendency to be packrats makes this a valuable source of information long erased from other sources.

2. Information in the server environment

Information stored on the company’s active servers consists of all data that can be readily accessed by employees, but that is stored remotely on the company’s network, including its email and voicemail networks. The questions regarding this category are properly addressed to anyone with responsibility for maintaining or administering the servers and should be aimed at determining what information is located on each server and how easily it may be accessed. For example,

- How many servers does the company maintain?
- What is stored on each server?
- What email system does the company use? Has it changed? Voicemail?
- What software is run on the servers?
- Are there uniform deletion policies for inactive data? Are emails swept from the active servers routinely?

3. Information in a backup environment

This category includes information that is not active but is retained on backup tapes, servers, disks, or other media. Companies back up almost every piece of electronic data for regulatory purposes or for disaster recovery, even if only temporarily. Questions on this data should be directed to employees who work closely with the company’s backup systems and should be aimed at determining what information is available in backup media and the burden of restoring and producing it. For example,

- What does the company back up? Its document servers, voicemail, email, instant messaging, etc.?
- How often does the company back up each? Why?
- When did it begin doing so?
- In what form does the company maintain backup data i.e. on a server, on tapes, on disks, etc.?
- How many tapes/other media exist for each backup?
- How long is backup data maintained?
- Are the backups cataloged? How?
- Does the company the technology and resources to restore the information from the backup media?
- What software or hardware is needed? How does it take to restore? Any special technical issues?

Conclusion

The process of becoming prepared for electronic discovery begins with identifying the right people in your organization and then determining what information the company has and how it can be accessed. Once a company has taken these steps it can take other action such as evaluating its document retention and litigation hold policies and developing a plan for responding to electronic discovery. A company that has taken these few preliminary steps now puts itself a step ahead of its peers and its opponents and moves more smoothly, defensibly, and less expensively into litigation in the 21st century.

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