

## E-Discovery: The Rules Catch Up to Reality

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Litigation discovery has been drawn progressively deeper into the electronic realm as electronic communication and records have permeated the world. Litigants have often coped with electronic discovery on an *ad hoc* basis. However, recent amendments to the Federal Rules of Civil Procedure make e-discovery an integral part of litigation. Although they only control federal litigation, state courts are also using the amendments for guidance.

As soon as the prospect of a lawsuit arises, counsel will promptly need a map of the client's computer and electronic storage systems to create a "litigation hold" for preservation of all relevant electronic files. To protect against a charge of spoliation of evidence resulting from, for example, deletion of emails, reassignment of a departed employee's PC to another employee, or overwriting of backup tapes, the litigation hold must take into account all forms of electronic files, such as e-mails, electronic presentations, calendars and task lists, instant messaging, electronic voice mails, CAD/CAM files, and electronic R&D, to name only a few. The hold must also take into account all electronic storage that exists throughout the organization, for example, servers, individual PC hard drives, back-up tapes, DVDs, memory sticks, ftp sites, employees' home computers that can remotely access the company's servers, and Blackberry and other "smart" phone devices.

The new rules contain a safe harbor against sanctions for destruction of electronic files that occurs because of "routine, good faith operation of an electronic information system." However, the safe harbor requires "good faith." Therefore, when file deletion that was previously routine continues to occur during litigation because of an incomplete map of the organization's computer environment, a litigant may lose the safe harbor protection. Counsel will need the following nine pieces of information, and more, to fashion a litigation hold, and also for the initial disclosures that must be served on the opposing party, and for negotiation of the terms that will govern discovery.

**ONE.** A description by "category and location" of all electronically stored information that the company may want to use to support its claims and defenses.

**TWO.** Steps that the company can live with for the preservation of electronic evidence, to guide what can be demanded of the other side without fear of "what's sauce for the goose is sauce for the gander."

**THREE.** The names of employees who are knowledgeable about the storage and retrieval of electronic files, and employees having custody of pertinent electronic documents.

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*ALERT CONTINUED...*

**FOUR.** A list of each computer and electronic storage device that likely contains any materials pertinent to the litigation, a list of each operating system that is used on those devices, and a list of each application used for any of the pertinent electronic files

**FIVE.** The format in which the various types of electronic files are store.

**SIX.** The time that the company's IS personnel will require to locate and turn over all the electronic files that need to be evaluated for possible production.

**SEVEN.** The company's electronic document retention policy, and the extent to which the policy may not have been followed. Problems of retention of electronic storage devices still in use that might contain pertinent files.

**EIGHT.** Identification of specific sources of electronic files that are not "reasonably accessible" and cannot be searched without "undue burden or cost," such as back-up tapes and legacy documents.

**NINE.** Merely reciting this partial list emphasizes the risk of delaying its collection until an actual lawsuit presents itself, when the need for quick decisions and action can lead to costly and prejudicial mistakes. The list also makes clear the critical need for close collaboration between counsel and the company's IS specialists.

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