Effective Electronic Discovery

Who, What, Where, When

by Dan Goldwin, Esq.

There are a number of reasons that electronic discovery continues to make news, attorneys and paralegals are demanding standards to govern electronic discovery, and courts around the country are considering (some are already implementing) local rules to change how attorneys manage the electronic portion of discovery in cases.

The ABA Task Force on Electronic Discovery, and the Discovery Subcommittee of the Advisory Committee on the Rules of Civil Procedure, are inviting public comment and considering options for best practices and possible rules changes. The news media continues to report blunders by companies who haven't mastered appropriate electronic housekeeping.

All this adds up to the conclusion that attorneys and paralegals face a steep learning curve to understand electronic discovery, and then stay current with the continual developments in the area. No matter what your level of electronic discovery expertise, gathering the answers to four simple questions will position you to handle electronic discovery effectively in any case.

Who?

Whether crafting electronic discovery requests to be served on an opponent, or examining a document request aimed at your own client, the first step in electronic discovery is to answer three "who?" questions: 1) Who are the document custodians of interest? 2) Who are the holders of electronic evidence relevant to the issues at hand? and, 3)Who is knowledgeable about how and where electronic documents are created and stored?

The answers to these questions will help formulate an overall electronic discovery strategy. In the same way key players and likely witnesses are identified early in traditional discovery, so must specific electronic document custodians or specific computer users be pinpointed in electronic discovery. Work closely with the client to prepare an outline—even a partial organizational chart—of all who may have created, received, or shared relevant information on their computers.

What?

Knowing who likely created responsive and potentially relevant electronic data is a good start, and next you must think about what kinds of electronic documents were created by the key players in order to formulate either an electronic discovery request or response. Not all computer users create information in the same way.

Company executives and members of upper management primarily use standard office software, including e-mail and word processing applications, or presentation software such as Microsoft's PowerPoint. People in finance and accounting departments tend to create large numbers of spreadsheets and other numbers-based data, and may use database systems. Engineers or computer programmers often use computer-aided drawing or other specialized technical software.

The best way to gather, process and review electronic data can depend greatly on the kind of data at issue.

Where?

Once key players and likely witnesses are identified, and an idea is formulated on the kinds of electronic documents they created, you need to think about where their electronic data "resides." Where is backup data stored? Where are documents saved on the network? Where are e-mail messages kept? What are the options for local storage on hard drives and removable media? Gathering this information early is necessary to guide an effective discovery process.

The requesting party should schedule a Rule 30(b)(6) deposition of the person most knowledgeable about the opponent's computer systems in order to determine all the likely locations of relevant electronic data. Courts frown upon "any-and-all electronic data" requests. Answering the "where" questions early in the case will guide help formulate appropriately targeted electronic discovery document requests, and will position you for the most effective and efficient electronic discovery process possible.

As a responding party, the "where" questions must be answered as soon as litigation is pending or imminent. This information is needed to carry out document preservation obligations and to determine from what locations you will need to collect data in order to respond to forthcoming document requests.

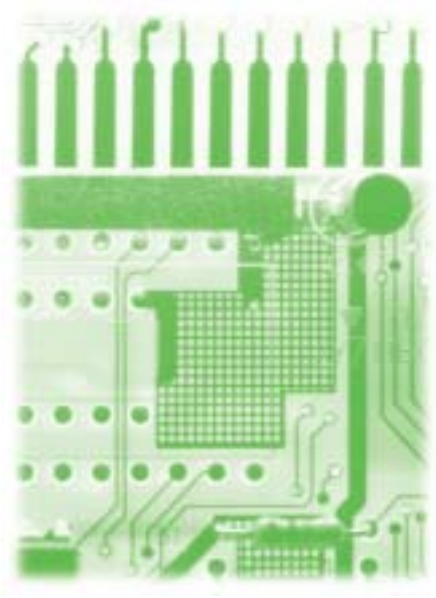
Having this information in hand early in the case can save considerable expense and delay once discovery is underway. Addressing the "where" questions in an expedient manner will also serve to minimize business interruptions for your client.

When?

The two "when" questions that must be answered are: 1) When does the duty to preserve electronic data attach? And, 2) When was the responsive data created?

As a responding party, one of the most important "when" questions centers on the desire to avoid claims of spoliation. In paper discovery, typically intentional acts prompt claims of improper document handling or allegations of spoliation. In electronic discovery, changes to data—even unintentional data destruction—can occur unless you take immediate precautions as soon as litigation is pending or imminent.

For example, backup tapes are typically rotated and recycled by companies on a predetermined schedule. If potentially relevant data is overwritten—even with the best of intentions and in the normal course



of business—courts may find evidence of spoliation, which can result in monetary sanctions or even an adverse inference instruction. End users also delete and overwrite data on a daily basis. Without immediate answers to the first "when" question, your client will begin the electronic discovery process at a distinct disadvantage.

The second "when" question involves the time of creation of responsive data. As a requesting party, you should narrowly tailor your electronic document requests to a sensible time period. This is another area where courts routinely demonstrate reluctance to allow overly broad requests.

As a responding party, you will be able to begin data gathering and plan your electronic document review approach only after you know what time period is at issue. With this information in hand, you can provide guidance to your client to avoid accumulation of excess data and unnecessary costs.

Conclusion

Many paralegals and legal assistants will face their first real experience with electronic discovery in 2004. For some, this will mean assisting attorneys with proactive measures to streamline electronic discovery practices before a document request is pending. For others, the experience will feel like trial by fire—scrambling to gather, process, review and produce electronic documents in the heat of battle.

From whatever position you begin, you must identify the who, what, where and when of electronic discovery early in the case.

Dan Goldwin is an attorney and Electronic Discovery Specialist in the Chicago office of LexisNexis Applied Discovery. Mr. Goldwin has worked with many legal professionals and their clients helping to educate them about the evolving law and practice of electronic discovery. Prior to joining Applied Discovery, he practiced in the intellectual property and litigation departments at the Chicago office of Sonnenschein Nath & Rosenthal LLP. He was graduated *cum laude* from the Northwestern University School of Law in 2000, where he was a member of the National Moot Court Team.

Mr. Goldwin is a frequent speaker on the topic of electronic discovery for law firms in Chicago, Cleveland, and Columbus, and at events such as LegalTech Chicago, the ABA Tech Show. His next speaking engagement will be an electronic discovery panel at the Corporate Legal Times Super Conference in June.