

# Law Practice TODAY

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## Electronic Discovery

### Prepare for E-Discovery in Four Easy Steps

#### Identify the Who, What, Where, and When

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Just when you thought there couldn't possibly be another news story, magazine article, or educational conference focused on electronic discovery, the topic flashes in the headlines again. Why is it that legal professionals just can't seem to get enough information about this subject?

There are a number of good reasons why electronic discovery continues to make news, and why the demand for electronic discovery education is still on the rise. The case law is developing at a steady clip. Courts around the country are considering—some implementing—local rules aimed at changing the way attorneys manage the electronic portion of discovery in any case. 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 media continues to report the blunders of companies who haven't yet mastered the art of appropriate electronic housekeeping. And all of these factors add up to one thing—attorneys face a steep learning curve first to understand electronic discovery, and then to stay current with the nearly constant developments in this area of practice.

No matter what your level of electronic discovery expertise, gathering the answers to four simple questions—who, what, where, and when—will position you to handle electronic discovery effectively in any case.

#### Who?

Whether you are 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 "who" questions will help you formulate your overall electronic discovery strategy. In the same way you identified key players and likely witnesses early in traditional discovery, you must also pinpoint specific electronic document custodians or specific computer users in electronic discovery. You should work closely with your client to prepare an outline—even a partial organizational chart—of all people 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. 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 programs, or presentation software such as Microsoft® 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 programs or other specialized technical software. The best way to gather, process, and review electronic data depends greatly on the kind of data at issue.

## **Where?**

Once you've identified the key players and likely witnesses in the case, and have an idea of 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.

As a requesting party, you should schedule a Rule 30(b)(6) deposition of the person most knowledgeable about your opponent's computer systems in order to determine all the likely locations of relevant electronic data. Courts frown upon catchall "any and all electronic data" requests. Answering the "where" questions early in the case will guide you in formulating 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. You need this information 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?**

There are two "when" questions that must be answered: 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. 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**

In the near future many attorneys will face their first real experience with electronic discovery. For some, this will mean advising clients about proactive measures to streamline electronic discovery 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 your case.

The information contained herein is not intended to provide legal or other professional advice. Applied Discovery encourages you to conduct thorough research on the subject of electronic discovery.

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**Virginia Llewellyn** is Vice President of Industry Relations for LexisNexis® Applied Discovery®. In this role, she manages the company's involvement in initiatives designed to educate legal professionals about the evolving law and practice of electronic discovery. Her work includes building relationships and coordinating events and activities with members of the government, courts, attorneys, and other industry professionals. Ms. Llewellyn is the author of the technology chapter in *Electronic Discovery: Law and Practice* (Aspen Law & Business, 2003), and she writes frequently for legal publications nationwide.

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