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Elementary, my dear lawyer

Take the mystery out of electronic discovery

By DAVID A. WILNER

Electronic discovery, an obscure concept a few years ago, has become widely known in legal circles. Hardly a week goes by without reports of electronic information being used in the country's highest-profile legal cases. With companies such as Enron, WorldCom and Merrill Lynch making front-page headlines because of the content of documents recovered from their computers, electronic discovery is now a commonly used term among litigation and antitrust attorneys, their clients and the courts.

Yet, as awareness of electronic discovery has grown, so has the confusion about what exactly it is.

In the simplest terms, electronic discovery refers to the retrieval of materials originating from a computer. In practice, though, true electronic discovery extends beyond the origin of the computer files to encompass the analysis, gathering, processing, review and production of discovery materials in electronic format from start to finish.

NEW PRACTICE AREA TAKES SHAPE

In the early days of electronic discovery, during the late 1990s, attorneys were still learning general electronic discovery concepts: how computer documents were created and stored, the form and types of electronic documents that were discoverable, and how technology such as e-mail changed the way their clients did business. As attorneys grew more knowledgeable, they real-

ized that a fuller understanding of the electronic discovery process could help them avert a crisis. Unfortunately, as attorneys sought advice on how to handle electronic documents in discovery, they usually received confusing and conflicting information.

Today, electronic discovery is frequently advertised as a specialty area of practice. Some of the largest law firms in the country have created electronic discovery practice groups, and they invest significant time and resources in marketing these skills to current and potential clients. Some electronic discovery service providers suggest that this field is so complex that expensive "expert witnesses" must be retained in every case involving electronic documents. Nothing could be further from the truth. Any attorney — regardless of his or her prior knowledge and experience — can make electronic discovery an effective part of every case.

THE DISCOVERY YOU ALREADY KNOW

Many attorneys are surprised to learn that electronic discovery processes are no different from those of traditional discovery — only the storage medium for the documents has changed. Attorneys should approach an electronic discovery project just as they would a paper discovery project, using the following five steps.

- The attorney must analyze the discovery request, identify document custodians, identify the locations of key documents and plan how the project

will be handled. Identifying documents created and stored on computers is no different from identifying documents that originated in paper form.

- Next, the attorney must gather all potentially responsive information. In the paper world, this involves retrieving and copying documents from clients' file cabinets and storage rooms. In the electronic world, it simply means retrieving and copying documents from computer files. The electronic version of this step is much easier and less labor-intensive than paper-based processes.

While some people tout the importance of computer forensics — complex evaluations of items such as deleted files, archived tapes and other information that is more difficult to access — in the electronic discovery process, in reality only a fraction of all cases require such extraordinary measures. Copying files from computer systems requires much less time and money than physically gathering and copying paper documents. In most cases, attorneys and their clients can complete the data-gathering step on their own with a little guidance along the way.

- In paper discovery, the documents must be processed by making working copies, stamping Bates numbers, storing boxes of documents in a central repository and, in some cases, scanning and coding the documents so images of the paper can be stored in a database. Electronic discovery enables documents to be quickly processed with automated technology that displays all

documents in a common file format, seamlessly assigns unique identification numbers, and stores the full text of all documents in a convenient, Web-based repository. Comparisons have shown that electronic document processing is typically 80 percent to 90 percent cheaper than paper processing.

- Manual discovery processes are time-consuming, labor-intensive and particularly error-prone in the review stage. Large teams of document reviewers rely on paper copies or fuzzy on-screen images of documents to locate key documents. When searching manually, critical information can easily be missed. With electronic discovery, the review team has easy access to the entire document collection from any computer with an Internet connection. Full-text searching allows the review team to find critical documents in a matter of days instead of weeks or months. The ability to redact privileged information or apply annotations to critical documents, all from one shared document repository, also makes the review team more productive.

- As with paper discovery, the ultimate goal of any electronic discovery project is to identify and produce only those documents that are relevant to the matter at hand, while protecting a

client's privileged or confidential information from disclosure. Electronic discovery streamlines this process by ensuring that only those documents designated as responsive are produced from the total collection, with redactions intact. Thus, the possibility of human error is removed from the process at this critical step. Electronic discovery also allows attorneys to produce a responsive collection of documents in either paper or electronic format.

KEEPING IT SIMPLE

While the technologies that enable electronic discovery processes are sophisticated on the back end, the result for the end user is incredible simplicity. Compare the invention of electronic discovery to that of e-mail. Less than 10 years ago, written communications were typically carried out through handwritten or typed correspondence. In business, people shared information via memos, letters and other paper-based documents that had to be printed, copied and distributed manually. Today, e-mail has largely replaced other forms of communication. The result for the individual is greatly enhanced speed and ease of communication; only the technology on the back end of e-mail communications is complex. The same is

true of electronic discovery.

The key to success in this area of a legal practice is to utilize the discovery best practices that people already know, while selecting an electronic discovery partner that provides a full array of services to streamline all phases of a discovery project — from analysis through data gathering, processing, review and production. There is no need to take a piecemeal approach to electronic discovery when one experienced service provider can assist with the full scope of work.

For attorneys who have been waiting to put electronic discovery to work in their cases, the time to do so is now. The latest technologies are more user-friendly and cost-effective than ever before. Combining sophisticated functionality with speed and accuracy, electronic discovery technology can replace old, cumbersome processes with simpler, more efficient methods.

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