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DIGITAL DISCOVERY

The Key to Containing Costs: Explosion of Electronic Information

By Virginia Llewellyn

While the much heralded “paperless office” never quite arrived, the age of electronic document creation certainly has. Each day, 9.8 billion e-mail messages are composed and sent, accounting for about half of the 13 terabytes of new electronic information created and stored each year. In fact, nearly 100 percent of all information is now created and stored electronically.

Though many companies know they face increasing discovery demands for electronic documents, most are not prepared. A recent American Bar Association survey asked litigators if their clients had an established protocol for handling electronic discovery requests. A staggering 83 percent said no. Of the same group, 70 percent said they expected electronic discovery to increase “dramatically” in the future.¹

While e-mail is the most commonly requested electronic document type in discovery, many people fail to realize that it is as important as the vehicle for transmitting other documents as it is for the content of the message itself. All electronic document types are frequently stored in multiple versions in various locations (including desktop PCs, laptops, backup tapes, disks, etc.), and may include “redlined” revisions or other relevant evidence stored in the document’s so called “meta data.”

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Meta data, commonly referred to as “data about the data,” may include original document storage path; creation and modification dates; links between e-mail messages and their attachments; conversation threads in e-mail messages; dates “sent” and “received” in e-mail programs; file size; hidden comments, formulae or other information outside the document print area; and, in some programs, more than 90 different types of electronically stored data. Meta data exposes a wealth of information about an electronic document, allowing you to go beyond seeing what the document looks like. It reveals the document’s behavior and tells you what it did.

Electronic discovery technology exists to provide lawyers with tools and resources to enable them to handle complex electronic discovery in a speedy, cost-efficient manner without interrupting the work flow of familiar business and discovery practices. With the use of such technology, corporate lawyers can gain a tremendous advantage in preparing their companies for legal document requests of any kind.

Effect on Litigation and M&A

Many companies are regular recipients of electronic discovery requests and need to know they have a reliable, cost-effective solution for reviewing thousands of pages of information for privilege and responsiveness prior to making a decision about which documents to produce. Other companies request electronic discovery from opponents and need a way to review, search and organize the information in a uniform format while preserving all the critical electronic docu-

ment properties and meta data that would be lost if the documents were reduced to printed form.

In some situations (class actions, multi-district litigation), the producing and receiving parties agree that developing a shared comprehensive electronic document repository—thereby allowing uniform Bates numbering and confidentiality marking—makes the most sense. This allows for sharing of costs and eliminates the headache of working with multiple, often incompatible document databases.

Electronic data is playing an increasingly important role in the second request phase of mergers and acquisitions. Armed with the knowledge that most business documents are now created and stored electronically, lawyers specializing in a mergers and acquisitions practice must find a way to streamline the process of reviewing massive amounts of information in a restricted period of time. The prospect of wasting valuable resources and time on the pre-review task of gathering, organizing and preparing volumes of printed materials (most of which originated in electronic form in the first place) is no longer acceptable. Today’s mergers and acquisitions professionals require an efficient electronic document review solution that allows them to complete their work on budget and on time.

Benefits of Electronic Discovery

Those who fear production of electronic data for financial reasons do not fully appreciate the advantages of electronic discovery. Electronic discovery in its true form is fast, cost effective

and gives corporations power over document review and production processes that they could only imagine in the paper world.

As a starting place for understanding these benefits, true electronic discovery must be contrasted from “electronic discovery” that takes an electronic file down the lengthy and expensive “electronic-to-paper-to-electronic-to-paper” path. Early technology developed in response to the increase in creation of electronic documents required the printing out of electronic evidence, scanning it into a consistent file format to be loaded into a database, subjectively coding key words into the database, and then storing the data in a desktop software application in its “new” electronic form. The “electronic discovery” that involves a volley between electronic and paper formats reduces the process to nothing more than an electronic review of paper documents. With this outdated approach, corporations are denied the benefits of using current, advanced electronic discovery technology to their fullest extent.

Current electronic discovery technology defines the next generation of electronic document review.

Computer-generated documents are never reduced to printed form. Instead, they are kept in electronic form that displays multiple file types (including word-processed documents, e-mails, spreadsheets, etc.) in a uniform portable document format (PDF). The PDF format maintains 100 percent of the text and meta data associated with the original electronic files and preserves the document’s original format (layout, fonts, colors, etc.). The electronic documents can be stored in a centralized database and available for reviewing, searching and preparation for production in discovery. The documents are available for review 24 hours a day, seven days a week through a web-based software interface hosted on a secure server. This form of “pure” electronic discovery is designed to eliminate all internal costs associated with housing data locally, including hardware and software costs, IT staffing expenses and other infra-

5 Tips for the Effective Use of Electronic Discovery

- **Practice Good Prolitigation or Pre-M&A Planning.**

Develop an electronic discovery response plan. Include key members of your company’s management team in preparing the plan to help them understand the implications of electronic discovery requests. Educate employees about the pitfalls of electronic communications, and develop guidelines for employee computer usage.

- **Know How the Courts in Your Jurisdiction Are Handling Electronic Discovery.**

Discovery of electronic data is allowed uniformly around the country, but the details of how production must be made can vary greatly from state to state. Familiarize yourself with this growing body of law so you are well prepared to explain the jurisdiction’s requirements to your company.

- **Know How Your Company Creates and Stores Electronic Data.**

Investigate the company’s protocol for creating back-up tapes. Do employees save documents on hard drives, or share information on a network? How is e-mail stored on the company’s servers? Are critical business documents stored only in electronic format? All these details will become key to effectively responding to an electronic document request.

- **Establish a Company-Wide Document Retention Plan.**

A proactive, companywide electronic data management protocol is the first step to preparing for inevitable electronic document requests. Be sure the law department and IT department are communicating about the legal standards for maintaining certain records, as well as the dangers of keeping too much information for too long. If your company already has a document retention policy in place, be sure it is properly enforced. If no policy is in place, begin drafting one as soon as possible.

- **Review Your Electronic Evidence First.**

In any document request situation, gather electronic information before paper documents. Chances are, your company’s most critical information is created and stored electronically. This critical data can be handled more efficiently and effectively if you review it first.

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structure expenses.

A state-of-the-art electronic discovery solution must go beyond creation of a database for text and meta data. A system that takes advantage of advanced computer technology also allows for the preservation of e-mail conversation threads, links between e-mails and attachments, on-screen redaction, custom document marking, elimination of duplicate documents, multi-level search functionality, one-step search and classification of documents, and multi-site or multi-party collaboration.

Electronic discovery saves time and money for corporate counsel and litigating attorneys by leveraging technology to meet deadlines, control costs and avoid the unnecessary risks associated with outdated discovery techniques.

A company’s investment in establishing sound electronic discovery protocols will pay off immediately. True electronic discovery practices control

the costs and inefficiencies associated with discovery, due diligence, and second requests in mergers and acquisitions. By leveraging current electronic discovery tools and services, a company can gain control of historical, current and ongoing document accumulation. All business information—whether current, archived or forgotten from disparate legacy systems—can be converted to a uniform format (PDF), preserving the integrity of the original documents and data while rendering them easy to review, search, analyze, redact, de-duplicate, organize, number and otherwise prepare for a multitude of purposes such as internal management analyses, litigation document productions, and commercial and regulatory due diligence productions.

(1) PriceWaterhouseCoopers/Section of Litigation of the American Bar Association Pulse Survey, May 2000.