

Chapter 1

Electronic Information in Litigation

| | | |
|-------|--|------|
| § 1.1 | TRANSITION TO ELECTRONIC INFORMATION | 1-2 |
| | A. Discovery Changes..... | 1-3 |
| § 1.2 | UNIQUE CHARACTERISTICS..... | 1-5 |
| | A. Informal Nature | 1-5 |
| | B. Metadata..... | 1-6 |
| | C. Preservation..... | 1-6 |
| | D. Deletion | 1-7 |
| | E. Storage Locations..... | 1-7 |
| | F. Disorganized | 1-7 |
| | G. Volume | 1-8 |
| | H. Redundancy — Archived and Backup Copies..... | 1-9 |
| | I. Searching Electronic Information — Costs | 1-9 |
| | J. Encryption..... | 1-10 |
| | K. Quality..... | 1-10 |
| | L. Alterations..... | 1-11 |
| § 1.3 | IMPORTANCE OF UNDERSTANDING ELECTRONIC DISCOVERY | 1-11 |
| | A. Discovering Electronic Information | 1-11 |
| | B. Producing Electronic Information | 1-12 |
| | C. Costs..... | 1-14 |
| | D. Sanctions for Failure to Disclose..... | 1-14 |
| | E. Providing Advice on Technology Issues..... | 1-14 |
| | F. Client’s Document Retention Policies | 1-15 |
| | G. Leverage | 1-15 |
| | H. Organize, Search and Analyze Case Information..... | 1-16 |
| | I. Evidentiary Considerations..... | 1-16 |
| § 1.4 | EVIDENTIARY VALUE OF ELECTRONIC EVIDENCE | 1-17 |
| | A. Informal Nature of Evidence..... | 1-17 |
| | B. Growth and Type of Evidence | 1-17 |
| | C. Metadata — Hidden Evidence | 1-18 |
| | D. Case Examples..... | 1-18 |
| | 1. Antitrust — Microsoft | 1-19 |
| | 2. Presidential Indiscretion — Monica Lewinsky | 1-19 |
| | 3. Police Brutality — Rodney King | 1-20 |
| | 4. Deleted Files Restored — Oliver North..... | 1-20 |
| | 5. Sexual Harassment and Retaliation..... | 1-20 |
| | 6. Race Discrimination..... | 1-21 |
| | 7. Securities Fraud | 1-21 |
| | 8. Trademarks and Trade Secrets | 1-21 |
| | 9. Domestic Relations | 1-22 |
| | 10. Bankruptcy Suit..... | 1-22 |

| | | |
|-------|----------------------------------|-------------|
| § 1.5 | ETHICAL OBLIGATIONS | 1-22 |
| | A. Generally | 1-22 |
| | B. Reported Cases | 1-29 |
| | C. Other Authorities | 1-31 |
| § 1.6 | JUDICIAL ROLE | 1-31 |
| § 1.7 | CONCLUSION | 1-32 |

§ 1.1 TRANSITION TO ELECTRONIC INFORMATION

The ubiquitous use of computers for creating electronic information has dramatically changed discovery and admission of case information. Whether in business, government or at home, information is created in an electronic format. “According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper.” *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002). Not only is this a pervasive change, it has occurred quickly.

In a short period of time technology, computers, and the Internet have radically changed the way we create and transmit information. In 1975 the first microcomputer was introduced which replicated the power of larger computers into a small desktop. This breakthrough was the result of the miniaturization of new microprocessor technologies called semiconductors. These were followed by the introduction of the first word processing software in 1978, which enabled people to easily write and change text and graphics. Over the next 20 years, computers found their way into millions of households and businesses. One commentator noted, “[i]n 1991 companies for the first time spent more on computing and communications gear . . . than on industrial, mining, farm, and construction machines. Infotech is now as vital . . . as the air we breathe.” Thomas A. Stewart, *The Information Age in Charts*, *Fortune*, April 4, 1994, at 75–79.

Coupled with the introduction of the Internet, which allowed information transfer in an electronic format, information created by computers could easily be transmitted worldwide in seconds. This combination laid the foundation for the societal change commonly known as The Digital Age, The Information Age, or the Multimedia Revolution.

Now people use computers in all facets of their lives. Computers are used to design graphics, produce full motion video projects, compose music, create and revise business documents, transmit business information through e-mail, make airline or hotel reservations and even participate in online chat rooms for business or pleasure. In addition, “office computers are used as ‘postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners,

shopping malls, personal secretaries, virtual diaries, and more,' . . . a phenomenon that is only compounded in a networked world, where a 'single physical storage device can store the private files of thousands of different users.'" *United States v. Vilar*, No. 05-621, 2007 U.S. Dist. LEXIS 26993, at *113 (D.N.Y. Apr. 4, 2007).

These activities are made possible by the advances made in this Digital Age.

A. Discovery Changes

The discovery of evidence has undergone a profound change. One author noted:

The courtroom is the crucible of the law, where the fire of litigation tests the intellectual and political forces that inform social policy. Discovery - the process by which litigants identify and assemble their evidence - provides the fuel for the fire. Indeed, not long ago most of the evidence that the discovery process produced was, quite literally, flammable: boxes upon boxes of paper documents. No longer is this the case. Computer technology has taken us from a world of paper to a world of digital media. It has changed almost everything about our relationship with information: how we create it, how much of it we create, how it is stored, who sees it, how and when we dispose of it.

James Gibson, *A Topic Both Timely and Timeless*, 10 Rich. J.L. & Tech. 49 (2004), <http://law.richmond.edu/jolt/v10i5/article49.pdf> (last visited on June 15, 2007).

Prior to the 1990s, most cases involved the discovery of paper documents. It was, and still is to a large extent, the norm to obtain printed discovery material, then copy and recopy, categorize, Bates-number, and file. However, in today's legal world, most discovery consists of technologically-based information: it is estimated that more than 30 percent of corporate communications never appear in printed form and more than 97 percent of information is created electronically. Peter V. Lacouture, *Discovery and Use of Computer-Based Information in Litigation*, 45 R.I.B.J. (1996); John H. Jessen, *Special Issues Involving Electronic Discovery*, 9 Kan. J. L. & Pub. Pol'y 425, 442 (2000).

Now it is required to discover not only printed materials, but also electronic information that has not been reduced to hard copy. In addition to searching for paper documents in corporate archives, file cabinets, branch offices and other physical locations, to keep up with the times, one must seek information contained on hard drives, removable storage media, cell phones, and other electronic storage devices.

With the availability of these new technologies discovery materials should be obtained in an electronic “native” file format in order to extract metadata that is contained in all computer files. Metadata is electronic information that is hidden in an electronic file and may contain valuable data relevant to your case.

In addition, receiving discovery materials in electronic format will assist you later in searching for specific information using standard litigation support software. Using full text search and retrieval software and/or a database, one can search and retrieve information about a particular person or issue in thousands of e-mail in seconds.

There have been several high profile stories — such as the Microsoft antitrust lawsuit, Monica Lewinsky, and Oliver North’s “deleted” e-mail — that detail the immense value of electronic information. Even though much publicity has been given to discovering the “smoking gun” from the opposing party, your client’s electronic information can also support their claims or defenses. Your client’s e-mail, office memos, and other communications can often support the factual basis of their case.

The process of discovering, producing, and presenting electronic information is different and will initially be more difficult than handling paper documents. Instead of worrying about how many copies of a document will be made, the focus will shift to electronic information; the file format in which you wish to either receive or disclose information, processing and searching software, and ultimately, its presentation in the courtroom. As the electronic discovery process matures, the methodology of discovering and producing electronic information will become commonplace. The paper discovery model served as a basis during the analog era, the electronic model will serve as the foundation during the digital era.

For most attorneys, their practice of law has not changed nor kept pace with computer technology and discovery rules. They still discover paper documents, even though most documents today are in an electronic format, and a significant percentage of communications, such as e-mail, are never printed out. The fact-finding process is beginning to focus on uncovering electronic messaging systems, Internet usage, word processing revisions, metadata, and other electronic information relevant to your case. This electronic information discovery process is a critical change and requires attorneys to understand and educate themselves about electronic discovery in order to incorporate it into their normal case preparation process.

§ 1.2 UNIQUE CHARACTERISTICS

Digitized information takes on very different characteristics. As set out below electronic information is different and in many ways contains information of greater value than paper information. Always remember that

electronic information is not just text or data, but also includes audio, video, and graphics.

A. Informal Nature

Because of its informal nature, electronic mail has encouraged senders to write unguarded, unwise, and often inappropriate comments. Although people would never make certain malapropos comments to another person directly or write them down in a letter, a person is more likely to use e-mail to write admissions that are subsequently used in litigation. Part of the reason for this informality is that “[y]ou’ve got more people who are lower down the chain of command putting things in writing than you did when it was a system of official memos. People are less discreet when they’re doing emails.” Phil Harris, *Electronic Discovery, Of Counsel* (April 2001).

Another reason is that businesses and other users usually do not realize that e-mail and other electronic data oftentimes create a permanent record. They treat e-mail as a verbal communication that can be simply deleted after it is read. In truth, the specific e-mail may be stored in many different locations and “undeleted” by using computer forensics. In two recent examples, business users have been reminded of the evidentiary nature of e-mails.

Also driving the desire for electronic discovery are the much-publicized e-mails that can make a case--such as Frank Quattrone’s e-mail to Credit Suisse First Boston staff following notice of a grand jury subpoena, reminding them of the company’s document-destruction policy, or the e-mail from former Salomon Smith Barney telecommunications analyst Jack Grubman, linking a research report he issued with his desire to obtain the help of Citigroup, Inc.’s CEO, Stanford Weill, in obtaining admission for his daughters to an exclusive preschool.

Walter, *Plaintiffs’ Law Firms No Longer As Disadvantaged*, *National Law Journal*, July 5, 2004, at S3.

This informal nature of comments also applies to word processing documents that have been revised by one or many authors. Within each word processing file there is what is commonly called metadata that stores the previous revisions and comments. The metadata can be opened and reviewed for unguarded comments by the authors of the documents.

B. Metadata

Electronic data files contain what is commonly referred to as “metadata,” “hidden data,” or “embedded data.” Metadata is additional, and often valuable, information about the electronic data, which does not appear on a printed copy of the electronic file. Computers of all types generate hidden data that is embedded in software files. Metadata is found in e-mail messages, word

processing documents, spreadsheets, and all other computer files. In word processing documents it may contain prior revisions, dates of revisions, authors and other information. E-mail metadata may contain who was blind copied on a message, which computer created or generated a message, and who opened and viewed a message. Computers can also contain information about Internet usage such as which websites were visited, though discovering it generally requires the assistance of a forensic specialist. Metadata may be more valuable than the more traditional forms of evidence in building or defending a case as it is often not consciously created by a user and is less vulnerable to manipulation after the fact. See, § 3.7, *Metadata, Hidden, or Embedded Information* and § 7.7(B)(2), *Metadata*.

C. Preservation

Litigants have an obligation to preserve electronic evidence in lawsuits and prevent its spoliation. However, electronic information can be changed, overwritten, or obliterated by normal everyday use. The simple acts of booting up a computer, opening a file, adding new data onto a hard disk, or running a routine maintenance program on a network can alter or destroy existing data without the user's knowledge. Ken Withers, *Computer Based Discovery in Civil Litigation*, 2000 Fed. Cts. L. Rev. 2 (2000).

This is unlike the preservation of information in paper-based discovery, where the information is generally physically stable. Preservation of electronic information can be a difficult task when considering the volume and potential numerous locations where it can be found. Because of the easy destruction of electronic information, special attention should be paid to the preservation of a client's relevant information that has to be produced.

If the producing party delays the discovery process and data is destroyed, they may have to contend with several court decisions imposing sanctions and outright default judgment for those who fail to preserve electronic information. The courts are not reluctant to impose sanctions for failing to preserve data. In *In re Prudential Ins. Co. of Am. Sales Practices Lit.*, 169 F.R.D. 598, 615 (D.N.J. 1997), the Court fined *Prudential* \$1 million for its "haphazard and uncoordinated approach to document retention" and not acting quickly to prevent the destruction of electronic data. See, § 7.9(A)(1), *Preservation Obligation*.

D. Deletion

It is a myth that deleting a computer file, such as a word processing document, will cause it to be destroyed. When a computer user pushes the delete key to erase a document, one is not destroying the document data, but instead merely removing the pointer or computer address of the document. The data remains, until it is overwritten by new data. Depending on its usage, this

could take minutes or years. In fact, since the computer data that corresponds to a specific word processing document or other electronic file may be located on different parts of a hard drive, remnants of a word processing document may be found even though other parts of it have been overwritten. However, attempting to retrieve deleted documents may be costly, time-consuming, and the results less than satisfying. *See*, § 3.5(E), *Deletion of Electronic Information*.

E. Storage Locations

Electronic information can be stored in any location in the world and on devices, ranging from pen drives (resembling a small ballpoint pen) to mainframe computers. Since electronic information can be easily transferred, it may reside on local business storage media or on computers thousands of miles away. This is dissimilar from paper-based discovery, where file cabinets, folders, and documents are generally located in specific physical locations. The portability of electronic information presents an additional issue since information can be easily transferred from one location to another. Searching and locating electronic information in a modern, distributed business-computing environment can be a challenging task. *See*, Chapter 2, *Creation and Storage of Electronic Information*.

F. Disorganized

Electronic information is disorganized. It is the exception for electronic information to be accurately stored in directories, subdirectories, and folders. Generally, since “electronically stored information” (ESI) can be found by searching for specific words or other data, users tend to store electronic information in various unrelated computer systems or directories. Many organizations do not have an electronic information custodian, and therefore information can be lost or misplaced. Even in small organizations, vast amounts of information generated over years of business can result in an inconsistent and chaotic filing system.

For example, in *McPeck v. Ashcroft*, 212 F.R.D. 33, 35 (D.D.C. 2003) the magistrate recognized the disorganization of electronic data on backup tapes and stated:

[t]he frustration of electronic discovery as it relates to backup tapes is that backup tapes collect information indiscriminately, regardless of topic. One, therefore, cannot reasonably predict that information is likely to be on a particular tape. This is unlike the more traditional type of discovery in which one can predict that certain information would be in a particular folder because the folders in a particular file drawer are arranged alphabetically by subject matter or by author.