

# WHY DISCOVER ELECTRONIC DATA ?

Why should a trial lawyer consider and pursue the discovery of electronic data? Because it provides new documents and data not available in written form and new sources of information that may be missing in other forms. Because it allows you to search, manipulate and analyze data and documents and to integrate them in your case management program. Because it allows for the use of technology to achieve cost effective discovery, i.e. faster, better, cheaper. Technology offers the possibility of sophisticated and automated searching, mining and analysis of information. It offers the opportunity for every lawyer to substitute technology for labor and to become more productive.

Discovery of electronic data is not an option. It is not limited to the “big” firms and may be more important to the “small” firm in leveling the playing field. Any lawyer who is not pursuing such discovery is ignoring reality since most documents are created electronically and many do not exist in any other form. The real “original” document, statutory definitions notwithstanding, is the electronic document or data including metadata [data about the data]. The printout of electronic documents is a modified and incomplete imitation. That does not mean that every lawyer must hire a computer forensic expert and engage in exhaustive examination of computer systems and discovery of all data on backup tapes. It does not mean that paper can be ignored or even that paper will not continue to be the primary source of information, discovery and evidence in most cases for some time to come. It does mean that every lawyer should consider at the outset the importance and value of electronic data in the context of the litigation and plan and act accordingly.

It also means that every lawyer must include technology in general and the use of technology in litigation as a part of an annual continuing education effort. Lawyers should also monitor developments in the use of technology in non-legal environments where the funds are greater and the objectives differ. What happens in the security, marketing, or pornography realm today may be applicable to litigation tomorrow. What was not technologically possible or relevant yesterday is essential knowledge today.

Electronic documents that normally do not exist in paper form and that often were not considered in the discovery process have proven to be the most fertile ground for discovery: e-mails; recovery of deleted documents from a hard drive; drafts, versions and modification to documents; hidden comments and information about the creation, modification and access to documents; access logs to buildings, records or documents; programs monitoring and recording employee e-mail and internet surfing; electronic data bases on every subject; toll booth records, grocery store discount card records, or email distribution lists to locate potential witnesses or parties; phone records and GPS tracking. The list is endless and expanding every day.

Electronic discovery is not limited to multimillion-dollar litigation; it may be critical in the slip and fall, the auto accident, or the bias of an expert revealed by electronic analysis of financial records. It may be essential in employment litigation or criminal prosecutions. Recent news reported an Ivy League dean removed for hacking competitor admissions sites, a California judge disciplined for surfing porno sites on the government computer, and a hit and run driver tracked from toll booth electronic payment records.

Lawyers need to recognize that electronic data is different. The volume is immense, consisting of much duplication, and often beyond ability of the normal lawyer to review in paper form. The good news is that often it may be searched electronically and duplications removed. It is highly volatile and subject to destruction, modification and fabrication. But, deletions can often be recovered and the proliferation of records and other electronic data often makes discovery, verification and authentication more reliable than with fabricated or destroyed paper documents. Electronic media may not require new rules but it does require an appreciation of the differences from paper in order to properly apply existing discovery rules to the new media.

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