

# Electronic Discovery Here to Stay

By

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**H**ow many of you have sought to discover and admit into court electronic information from an opposing party? In my informal polls few of you can answer this question in the affirmative. However, this is an extremely important litigation issue and will increase in importance. The world has changed. Now, millions of e-mails are sent daily; a typical person receives more than 30 a day. Drafts and redrafts of important business and other word processing documents are viewed and commented upon by many people and stored on computers located in many different locations. Conversations between business associates are occurring in realtime with instant messaging. Many individuals and businesses use individual or joint calendars. Many documents, data and other electronic materials are no longer being converted to paper but are created, revised and stored in electronic format. Because of this, it is necessary to “discover” this electronic information in your cases.

Would it assist you to:

- View the e-mail of an opposing party who corresponds with other people about the details of his or her accident and alleged injuries?
- Obtain e-mail or other electronic evidence from an employer who has been sexually harassing an employee?
- Read the e-mail between the owner, employees or customers in a business dispute case?
- Read drafts of documents or internal memoranda that discuss the opposing business party’s strategy to unfairly compete against your client’s services or products?

Most cases probably contain electronic information from the opposing party that is relevant and discoverable in your case. But if you have access to the paper discovery, why discover electronic information? Because electronic information is different and in many ways contains information of greater value than analog or paper information.

1. Creation of electronic information is often made without concern as to formality or an understanding that it can be later discovered—as seen in the Microsoft antitrust trial.
2. Drafts and redrafts of electronic documents often can be discovered. Both Microsoft Word and WordPerfect have features that allow prior drafts of word processing documents to be recovered and viewed.
3. Metadata or “imbedded data” is often contained in electronic files that allows you to view the author, persons who viewed the document and changes made to the document.
4. Electronic evidence is more easily deleted, destroyed or altered. But “deleted” information may be “undeleted” and files opened and viewed—and the information may not have been deleted from all computers.
5. Once “discovered,” electronic information can be searched by word, phrase or date. If you obtain electronic information through discovery, it usually is in a full-text format that lends itself to be searched via software.

6. Whereas paper documents are usually located in certain files and file cabinets, electronic information can be stored in many different formal and informal locations in a computer system. How electronic data are created and stored is very important. Interrogatories or discovery depositions should focus on the system the opposing party is using regarding the type of computer systems used, filing system, archival of data, destruction of e-mail, and so forth. This prevents costly discovery and needless searching of electronic information.

Finally, authentication and laying the foundation for electronic information for admissibility must be treated with extreme care. There are horror stories of IT personnel or attorneys who, after discovering electronic information, do not “open” and view the data properly and open the door for challenges to the foundation for the discovered information. The request, production, use and admissibility of electronic information are part of a complex process. Interrogatories requesting information as to the systems and personnel responsible for electronic data must be prepared and served. Request for production or electronic replication of the electronic information must be filed requesting “copies” of “hard disks” or other storage media. A computer forensics expert is generally needed to assist in the identification and conversion of electronic information. Unfortunately, this can be expensive, but as this discovery area matures, less costly methods will be developed to allow for discovery and admission of this information.

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