

The Proliferation of Electronic Discovery in Litigation

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As technology continues to advance, corporations and businesses must stay on top of the legal and technical developments in the area of electronically stored information (ESI). The expansion of electronic records is having a profound impact on litigation. In the past, discovery requests relating to electronic data generally were limited to a request for e-mails. This is not the case today as more documents and data are retained in electronic format.

Litigation suspends the routine document retention/destruction policies and requires the issuance of a litigation hold to ensure the preservation of relevant documents. Litigation hold notices should be sent via e-mail and regular mail and periodically reissued; contain an overview of the case; identify documents and data to be preserved; provide clear instructions on preservation of documents and data; and contain contact information for legal and technical personnel. Discovery obligations do not end with the implementation of a "litigation hold." You and your counsel must oversee compliance with the litigation hold and monitor the efforts to retain and produce the relevant documents.

Litigation counsel must work very closely with their clients to ensure that the electronic discovery process is approached in accordance with the applicable laws and is as cost effective as possible. Counsel must develop guidelines to assist their clients in this process. The greatest concern for many clients regarding electronic preservation is the associated costs involved. The importance of planning ahead is paramount. Early attention to electronic discovery issues is essential after the 2006 amendments to the Federal Rules of Civil Procedure. Specifically, F.R.C.P. 26(f) requires parties to initially address issues relating to electronic discovery, including the format of production. The rule addresses preservation of discoverable information, discovery of electronically stored information from sources that are not reasonably accessible and the procedure for asserting a claim of privilege or work product protection after production.

In response to the concerns related to inadvertent disclosures in the context of electronically stored data, federal rule of evidence 502 was enacted. This new rule of evidence is designed to protect litigants against the inadvertent disclosure of privileged materials; a common pitfall for many entities producing hundreds of thousands of electronic documents to opposing parties. There are numerous considerations when working with this rule, however, it is most important to understand that: (1) the rule only protects disclosures that were not intentional; (2) the party must take reasonable steps to prevent disclosure of privileged documents; and (3) the party must take immediate steps to protect itself after the inadvertent disclosure.

The proliferation of information in the electronic age requires an understanding of not only the legal issues involved, but also the technical issues related to preservation, review and production of evidence. As the field of electronic discovery continues to expand, you must be prepared to review, identify and address your electronic discovery needs in every situation, no matter the size or budget.