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# Electronic Evidence and Discovery: What Every Lawyer Should Know

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# FOREWORD

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The protodigital age is now ending for the legal profession. For a quarter century or more, we utilized computer technology to perform complicated calculations, print our documents, and send messages to our colleagues. We viewed computers as tools to help us go about our daily professional lives. Some of us even recognized that computers might be the repositories of discoverable information, the place to find "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form," to use the quaint language of the 1970 amendments to the Federal Rules of Civil Procedure. But we were thinking in protodigital terms. We thought of computers as tools to make conventional business tasks faster and easier, the same way we once thought of radio as wireless telegraph technology or the automobile as a horseless carriage.

In the protodigital age, it was useful to think about computers and computer operations using metaphors or analogies. We spoke of "spreadsheets," "word processing documents," "electronic mail," "web pages," and other allusions to fixed, tangible objects of the paper media world. The 1970 amendments to Fed. R. Civ. P. 34 placed "data compilations" under the rubric "documents" and the Advisory Committee Notes dwelt on the need for the respondent to "supply a print-out of the computer data." That made sense in the protodigital age, when computers were viewed as powerful business tools to create paper records. As late as 1977, Kenneth Olsen, the founder and CEO of Digital Equipment Corporation, declared "there is no reason for any individual to have a computer in their home." See Greatest-Quotations.com, <http://www.greatest-quotations.com/search.asp?quote=Home&page=14> (visited October 31, 2003).

Twenty-five years later, we cannot imagine *not* having a computer in our home. We have no choice. We are surrounded by computers, sensors, recorders, players, and digital storage devices of every de-

scription. What marks the end of protodigital thinking is the realization that computers have done more than perform complicated calculations; they have changed the nature of calculation. They have done more than print our documents; they have changed the way we compose and present our thoughts. And they have done much more than send messages to our colleagues; they have changed the way we communicate. The role played by computer technology in our lives now has little to do with generating business papers. Analogies to the paper media world are no longer useful.

The law always follows social development. When the Rules of Civil Procedure were amended in 1970 and the Rules of Evidence shortly thereafter, email as we know it didn't exist. Today is it a primary target of discovery in both civil and criminal cases. One in every seven U.S. companies has been ordered by a court or regulatory agency to produce email. Gregg Keizer, "Lack of E-Mail Policies Could Put Companies in Hot Water," *InformationWeek*, June 17, 2003. <http://www.informationweek.com/story/showArticle.jhtml?articleID=10700336>. Computer data is routinely presented as evidence in both civil and criminal courts. Electronic case filing is being implemented across the country. Government agencies are required to do business electronically and make public information available in digital form. High-profile business executives have been arrested and tried for the destruction of electronic evidence—evidence that they, or their lawyers, may not yet think of as "real" because the evidence was never reduced to paper form, nor is it even susceptible to being printed out.

The common law development was slow at first but is quickly picking up speed. In the 1980's and 1990's, only a handful of reported cases dealt squarely with the discovery or use of electronic evidence. Since 2000, the case law has exploded, and the cases deal with a number of complicated questions, including cost allocation, the duty to preserve electronic evidence, and the effect of inadvertent production of privileged electronic communications. Judges are becoming experts in computer technology and electronic records management issues, as evidenced by Judge Facciola's discussion of backup tapes in *McPeck v. Ashcroft*, 202 F.R.D. 31 (D. D.C., 2001); Judge Nevas' exploration of computer forensics in *United States v. Triumph Capital Group*, 211 F.R.D. 31 (D.Conn. 2002); and Judge Scheindlin's mini-treatise on electronic storage technology in *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003).

But some things have not changed. Discovery and the presentation of evidence in court are truth-seeking processes central to the administration of justice. These processes are conducted under rules that we

often overlook. Rule One of the Federal Rules of Civil Procedure establishes that the rules that follow are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” Similarly, Rule Two of the Federal Rules of Criminal Procedure states that “[t]hese rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” Finally, Rule 102 of the Federal Rules of Evidence states that “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development in the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

In the protodigital age, it was very easy to ignore the unique aspects of electronic evidence and concentrate those tangible manifestations that looked and felt like objects from the analog world—paper printouts, photographs and drawings, or images on screens. By concentrating on these manifestations, or deliberately ignoring the more complete electronic files and computer operations that produced them, the truth-seeking purpose of discovery and evidence law was not being served. But an opposite and equal danger existed. Litigants could become obsessed with computer and information technology and lose sight of the truth-seeking goal, impeding the “speedy and inexpensive” determination of the action.

The key to striking a balance between these two extremes, at least in civil cases, is Fed. R. Civ. P. 26. Rule 26 lays out a clear division of burdens between the requesting and responding parties. This division creates opposing forces which assist the court in steering a course down the middle.

The requesting party has the burden of showing that the information being sought is relevant to the issues at hand—relevant first to the claims or defenses of the parties, and if good cause is shown, relevance to the subject matter of the dispute. In the computer world, there will likely be metadata, embedded edits and commentary, deleted files, and system data waiting to be discovered. There may be special procedures for discovering computer evidence, such as on-site inspection of computers or special procedures for preserving the evidence, such as creating bit-stream images of computer hard drives. But the burden is on the requesting party to demonstrate that any of these data sources are relevant to the claims and defenses of the parties (or the subject matter of the dispute) or that the procedures are necessary to obtain or preserve relevant and discoverable evidence. This case law is

full of examples of overbroad discovery requests being denied and unjustified procedures being prohibited.

The responding party has the burden to either produce the information sought by the requesting party or demonstrate that there are privileges, undue burdens, alternative sources of information, or other reasons to object to the discovery. Simply stating that the information is in the computer and not in a preexisting tangible form that can be handed to the requesting party is not enough. It is worse for the responding party to state that it does not know whether it has the requested information or cannot assure the court that relevant data will be preserved because it either does not understand or does not control its own information technology. The case law is full of examples of broad discovery being ordered when the responding party is uncooperative and sanctions being imposed for failures and misrepresentations to the court.

The allocation of burdens between the requesting and responding parties and the consequence of failure to meet those burdens existed in the pre-digital age when discovery consisted almost entirely of interrogatories, depositions, and requests for paper documents. The issues become much sharper and the burdens on the requesting and responding parties much clearer as we enter the digital world. When businesses operate through vast, complex databases and data management systems, "documents" in the conventional sense no longer exist. Although perhaps framed as a document request in the conventional sense of Fed. R. Civ. P. 34, a request for "electronic documents" is really a request to the responding party to query its database and generate reports based on certain criteria, more akin to the request under Fed. R. Civ. P. 33(c).

Where the requesting party in the past has the luxury of requesting documents relevant to a specific claim or defense, the requesting party must now be more specific in identifying not just the topic, but the elements of data that the party needs and the form that they require. If chronology or authorship of particular files is an issue, then a request for metadata may be appropriate. If evolution of a contract or memorandum is relevant, then a request for embedded edits may be appropriate. If fraud is alleged, a request for system data or to image a hard drive may be appropriate. Each of these requests must be backed up by a showing of relevance.

On the responding side, it is also no longer business as usual. Conventional searches of paper files are clearly inappropriate in most business litigation, as are conventional litigation "hold" orders to employees to save their paper. Production of "documents" in the form of

printouts or static computer images may also be inappropriate if the claims and defenses of the parties suggest more. But most importantly, blanket objections based on burden or overbreadth are out. Every response must be shown to be reasonable and every objection of undue burden must be backed up by a realistic showing of the cost, business disruption, and other burdens involved.

And that's why this book, and continuing education on electronic discovery and evidence for both lawyers and judges, is so important. Requesting parties need to know what is out there and must be able to relate their claims or defenses to the information they seek. Responding parties need to know how to respond and what the real costs are likely to be. Judges need to know what is reasonable to expect from both parties.

Michele Lange and Kristin Nimsger have distilled their practical trailblazing experience into the first edition of a guidebook through this territory. Using this guide, readers will be able to identify the major rivers and mountains and safely conduct themselves through what appears to be a jungle. But this is just the first edition guidebook. More trekkers will follow, the paths will get smoother, and the settled areas more commodious as case law develops, new rules are adopted, and technology evolves.

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