



Electronic Discovery—Ready or Not, It's Here
by John M. Sier, Esq.

No one wants to be sued and few companies or individuals willingly elect to pursue litigation in federal courts. However, litigation is not always a voluntary process, and if you are being sued or receiving a subpoena, there is a particular issue that may impact your case and your future: electronic discovery. With the recent amendments to the Federal Rules of Civil Procedure that govern the discovery process in federal court litigation, all companies—and even individuals—need to be aware that electronically-stored information is expressly subject to becoming a key part of the litigation, even if you are not a party to the lawsuit.

As everyone knows, electronic communication and storage devices have become so common that much business communication and many transactions never actually reach the paper medium. Between electronic mail, text messages, instant messaging, and other forms of digital communication, there are fewer letters being utilized as the official form of business communication. Yet, the proliferation of communication and storage devices has created a surfeit of information for lawyers to mine during litigation. In fact, the exponential growth in available information quickly overwhelmed the former procedural rules in place despite several modest amendments. Rather than taming the paper tiger, the new rules now seek to control the “electronic elephant.”

While there are substantial changes pertaining to the way that the lawyers will be required to manage and coordinate the discovery process, there are also significant changes that affect the way that small and large companies—as well as individuals—will need to treat electronically-stored information. The fundamental principle requires that reasonably accessible electronically-stored information should be preserved as necessary and made available to be produced in some form. As is usually the case, that's easier said than done.

The amended rules contain phrases like “reasonably accessible,” “undue burden or cost,” “routine operations,” and “good faith,” which are defined by the circumstances and don't allow clear direction. Because these amendments are new, there are nearly limitless permutations of how the rules will be interpreted and applied; what may constitute good faith in one case may not be good faith in another case. However, there are general rules that can provide some level of comfort and protection. The electronically-stored information needs to be treated consistently with a policy of retention or destruction as part of routine operations. If you are aware of the potential for litigation, you need to make some arrangements to identify, segregate, and preserve the related electronically-stored information. If you respond to a request for information by claiming that the information is not reasonably accessible, you may be required to prove the extent of the burden and cost. Disaster recovery back-up tapes, unrecoverable data, and archived legacy data are some sources of electronically-stored information that the rules recognize may not be reasonably accessible without undue burden or cost. You need to be aware that there are several consultants and vendors claiming the ability to make nearly all electronically-stored information reasonably accessible. As a result, you will need to work closely with both your legal advisor and your technical advisor in evaluating what information is reasonably accessible.

Here is an example of the impact of the amended rules. One year ago, you exchanged emails with another person regarding a potential contract. The contract never gets finalized for a variety of reasons, but someone is disappointed by that result and starts a lawsuit in federal court. You have now been added to the litigation in federal court, and a request is made for the production of your paper records, along with emails related to that failed transaction. Your system normally deletes old emails and other electronic information after 6 months and your backup tapes are recycled on a monthly basis. If you were aware that the failed transaction could have resulted in litigation, you should have been preserving those emails that might be relevant to a potential legal action. Even if you weren't aware of the potential litigation, it could be expected that you would have a procedure for preserving or retrieving those deleted emails. In this case, your attorney will need to be able to discuss your computer system—including the network infrastructure, the types of electronically-stored information that you have, how it is being preserved, where and in what form it is maintained, and how it will be produced. This will necessarily involve persons familiar with your computer systems at the earliest possible stage, if not in advance of, the litigation.

Would you be able to explain what happened to those emails? Would you be able to extract that particular cup of water as it shoots out of the fire_hose? You need to be aware and be prepared by implementing processes for data identification, segregation, and preservation before the need arises. This is both a legal and technical problem, and you should consult advisors from both areas regarding how best to protect you and your company.



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