Computer-Based Discovery in Federal Civil Litigation

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Computer-based discovery can reduce litigation costs and improve the presentation at trial. Judicial management can help to achieve its potential.

DISCOVERY IS CHANGING in response to the pervasive use of computers. More and more cases involve e-mail, word-processed documents, spreadsheets, and records of Internet activity. In some cases, computer-based discovery can be routine and uneventful. The parties may agree simply to exchange computer disks of documents instead of paper. In many cases, however, computer-based discovery generates disputes over the scope of disclosure, form of production, privilege, and alleged spoliation. The costs associated with computer-based discovery procedures can be extraordinary. In many of the re-

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ported cases on electronic discovery, failure of the attorneys to understand their own clients’ computer systems, routines, capabilities, and limitations were at the heart of the problem. Early identification of potential discovery problems and early resolution of these matters may be the key to reducing costs and delay in cases involving computer-based discovery.

This article is divided into three sections. The first section briefly discusses some of the positive aspects of computer-based discovery. The second section explores the unique problems of computer-based discovery, and offers some discovery management suggestions to attorneys. The third section focuses on the judicial role in managing computer-based discovery and preventing or resolving some of the more common disputes. Finally, the Appendix provides a checklist of computer-based discovery considerations for a Rule 16(c) pretrial conference.

POTENTIAL ADVANTAGES OF COMPUTER-BASED DISCOVERY • A tremendous body of professional and academic literature is developing around the issue of computer-based disclosure, discovery, and evidence. Much of this literature is premised on the notion that computer-based discovery increases the cost and complexity of civil litigation. Kenneth J. Withers, *Is Digital Different? Electronic Discovery and Disclosure in Civil Litigation* (literature review prepared for the British Irish Legal Education Technology Association, 30 December 1999) at http://www.kenwithers.com/articles/bileta/index.htm. But no empirical research directly compares computer-based discovery to analogous conventional discovery, and there is a strong argument for the opposite premise, that the exchange of computer data, as opposed to paper, will reduce cost and delay:

- The costs of photocopying and transport can be reduced dramatically or eliminated altogether. In the nationwide breast implant litigation, MDL-926, conversion of just one-third of the discovery documents and court papers to computer form resulted in an estimated savings of $1,146,500 in copying costs per party requesting a complete set of the documents. E-mail message from Tina J. Crowe, Supervisor, National Multidistrict Litigation Document Repository, to Kenneth J. Withers (27 April 2000) (on file with the author). This savings potential has also been noted in British civil litigation, *Grupo Torras v. Sheik Fahad Mohammed al Sabah* [1998] Masons Computer L. Rpts. 90;
  - Finally, electronic discovery leads logically to electronic evidence. It stands to reason that many of the media conversion costs associated with electronic courtroom presentations can be reduced or eliminated if the documents are in electronic form from the start.

Substantive Advantages

Computer-based discovery offers substantive advantages, as well. Evidence that would have been impossible or extremely difficult to obtain can now become part of the truth-seeking process. Drafts of documents that were routinely lost or destroyed in the conventional paper-based world are now retrievable. Gregory S. Johnson, *A Practitioner’s Overview of Digital Discovery*, 33 Gonz. L. Rev. 347, 360 (1998). Nearly all of the modern panoply of computer-mediated communications, from e-mail messages
to digital telephony to virtual conferences, are recorded and saved as digital “documents.” James H. A. Pooley and David M. Shaw, *Finding Out What’s There: Technical and Legal Aspects of Discovery*, 4 Tex. Intell. Prop. L. J. 57, 60 (1995). Vast amounts of data that would have been impossible to collect and manipulate in the conventional paper-based business world can be assembled, transmitted, manipulated, and analyzed by computer. In the Microsoft antitrust litigation, the task of quantifying potential damages was simplified by the court granting the Department of Justice direct access to Microsoft’s computerized sales and pricing data. Kim S. Nash and Patrick Thibodeau, *What’s In a Database? Microsoft Sales Evidence: Court Allows DOJ to Check Files in Redmond*, Computerworld, 19 October 1998, at 4.

Judges are becoming more sophisticated about computer-based discovery and more willing to manage the process actively. As one computer forensics expert noted in a recent conference, the increased sophistication of judges in this field has “raised the bar” for attorneys appearing in computer-based discovery cases. When attorneys realize that they no longer can muddle, bluff, or stonewall their way through computer-based discovery, they will be forced to educate themselves and their clients, and may become more forthcoming and cooperative with their opponents. John Jessen, CEO, Electronic Evidence Discovery, Inc., speaking at Glasser LegalWorks 3d Annual Conference on Electronic Discovery, San Francisco (24 March 2000).

**UNIQUE PROBLEMS OF COMPUTER-BASED DISCOVERY** • Though computer-based discovery has many potential advantages, it can raise unique issues that normally do not occur or are less problematic in conventional, paper-based discovery. Among the most common difficulties are the preservation of data subject to discovery; the location and volume of data; e-mail as a novel medium; documents that have been deleted from the computers; backup tapes, archives, and legacy data; the conduct of on-site inspection; the form of production; and the need for expert assistance.

**Preservation of Information**

In conventional paper-based discovery, the documentary sources of information have been, for all intents and purposes, physically stable. Attorneys seldom have cause to assume that paper or microfilm files are subject to imminent damage or destruction. Fire, flood, or corporate document destruction procedures occasionally result in the loss of potential evidence, but these are relatively rare occurrences. On the other hand, information stored in electronic form is easily changed, overwritten, or obliterated by everyday use of the computer, whether it is a single desktop PC (personal computer) or an enterprise-wide network. The simple acts of booting up a computer, opening a file, adding new data onto a hard disk, or running a routine maintenance program on a network can alter or destroy existing data, without the user’s knowledge.

**Securing the Integrity of the Information**

At the outset of litigation involving computer-based discovery, attorneys on both sides have a heightened responsibility to inform their clients of the duty to preserve potential evidence. Counsel who may be seeking discovery of computer-based information should immediately notify opposing counsel of that fact and identify as clearly as possible the categories of information that may be sought later. Counsel who may be responding to computer-based discovery may not want to wait for such notification, however. To avoid possible embarrassment and accusations of “negligent spoliation,” he or she should identify the computer-based
information likely to be subject to discovery and take reasonable steps to secure the integrity of that data. In Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998), a defamation and unfair trade practices case, the plaintiff failed to segregate and preserve e-mail files that it knew would be subject to discovery. Ironically, the plaintiff had insisted early in the case that the defendant save all of its e-mail. Even though no specific preservation order was in place, the plaintiff was sanctioned $10,000 for its breach of discovery duties.

Early in the case, the parties should meet and try to agree on the steps each will take to segregate and preserve relevant data, to avoid later accusations of spoliation. At the Rule 16 pretrial conference, the judge can issue a preservation order in line with the agreement.

**Location and Volume of Data**

In the days of conventional paper-based discovery, most organizations had centrally-located files or a limited number of physical file locations. In the PC-based world, each employee may have a desktop computer, plus disks or other removable data storage media, a laptop computer, a home computer, and a hand-held personal organizer, all containing potentially relevant data. Larger organizations will have network servers connecting and storing data for many PCs, plus backup and archival data storage (discussed below). Offsite and even offshore data storage facilities, Internet service providers, and other third parties may also hold data subject to discovery. Michael R. Overly, *Overly on Electronic Evidence in California* (1999) 2-31 (a three-page checklist summarizes the preceding chapter on “Sources of Electronic Evidence”). The cost and complication of conducting discovery in a modern, distributed business computing environment can be enormous.

**The Information Management Gap**


**The Spoliation Danger**

The combination of multiple locations, tremendous volume, and arcane or non-existent records management practices is potentially explosive for defending counsel. In *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. Ct., June 16, 1999), the defendant faced sanctions in the form of costs and a spoliation inference stemming from counsel’s failure to completely investigate stored computer backup tapes, while representing to the court that all relevant computer files had been produced. *Linnen* was one of the various state product liability actions stemming from the marketing and distribution a diet drug combination popularly known as