

Responding to Electronic Discovery Requests

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You've just been named a party to a lawsuit, and, along with a list of typical document requests, you find that you have been asked to produce all of your e-mails and other electronic files: where do you begin?

Unlike productions involving only paper discovery, it is not enough to grab relevant files off desktops or from filing cabinets. The universe of potential locations for relevant documents is immense, including office computers, laptops, network system drives, floppy disks and other removable storage media, PDAs, and countless other electronic devices that store information as varied as e-mails, memoranda, spreadsheets and calendar and address books. The task of gathering responsive documents may be daunting, but with strategy and assistance, it is manageable. This article is the second of a three part series: the first article described potential document production obligations for attorneys; this article discusses steps in responding to electronic document requests; and the third will outline suggested record retention policies.

As discussed in more detail below, there are 6 basic steps that you should take when facing a discovery request that encompasses electronic documents:

1. Evaluate request for overbreadth or undue burden
2. Seek expense shifting or sharing
3. Locate responsive documents
4. Halt backup and archive deletion procedures
5. Review for privilege and confidentiality
6. Produce responsive documents in a timely manner

1. Evaluating E-Document Requests

Before heading out to round up requested electronic documents, a person on the receiving end of a document request should consider whether an objection to the request might be well received. As with any discovery request, courts subject electronic discovery requests to proportionality reviews, weighing the burden of producing the requested documents against the expected benefit to be gained from the document

production. Federal Rule of Civil Procedure 26(b)(2)(iii) directs courts to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit.”²

It is also worth considering whether there might be some procedure for decreasing the burden of a proposed electronic document production (even if that procedure has the coincidental effect of creating a possibility that some responsive documents might not be produced). Electronic documents particularly lend themselves to such burden-lessening procedures. One recent case in the Federal District Court of Delaware is instructive. In that case, Tulip Computers International v. Dell Computer Corporation, the court adopted plaintiff’s proposal that its expert conduct a search of defendant’s electronic documents; under the proposal the expert used keyword search terms agreed upon by both parties and defendant was then responsible for producing only identified documents.³

2. Shifting or Sharing Production Expenses

The cost of electronic discovery can vary, but can be especially great when backup systems are designed to collect all of a network’s electronic information (including files from a variety of applications) within a structure that is designed to be accessed only through the process of entirely restoring the network (for example, these systems are typically used only in the case of significant network failure). Courts have varied in their treatment of the issue of which party should pay for the discovery of electronic documents, sometimes requiring the producing party to cover the cost (especially when its own arcane storage system is responsible for the extreme cost), sometimes ordering that the cost be shared between the discovering and producing parties, and sometimes requiring the discovering party to pay the cost.⁴ A recent case employed an 8-factor balancing test for determining which party should bear the cost, considering such factors as the specificity of the discovery requests, the likelihood of discovering critical information, the total cost associated with production, and the relative ability of each party to control costs and its incentive to do so;⁵ that 8-factor test has been adopted and cited favorably by other courts. When appropriate, a producing party should move for a shifting or sharing of production costs.

Aside from the cost of culling and recovering electronic documents from their storage media, a responding company potentially faces the cost of temporarily shutting

down its computer system or altering its backup procedures during the discovery phase of litigation. And because accessing a document, and in some cases the mere act of turning a computer on or off, alters potentially important “metadata” (certain information an electronic document or a related electronic file contains about the document’s characteristics, such as dates accessed and printed, names of authors, and edit history), a party may need to cease any use of its computers until hard drives containing responsive documents are “imaged” (cloned or copied electronically), thereby preserving a copy of the system’s data. Unless such a system shutdown can be avoided through a protective order of the court, the producing party generally must generally bear the associated business expense itself.

3. Locating Responsive E-Documents

A principal challenge in responding to electronic document requests is locating responsive documents. To help meet that challenge, even before an electronic document request is received, companies need to be made aware of the importance of organizing their procedures for storing electronic documents. A law firm might be in a better position to advise clients regarding this issue if it set the example of establishing sound record retention policies for its own documents. The third and final article in this series will discuss suggested record retention policies, but some mention of the importance of organizing electronic document storage procedures is valuable at this juncture.

Centralized document management software is vital to responding effectively and efficiently to document requests. Ideally, every electronic document would be stored in a single central repository (with appropriate backups and access limitations to ordinary users). Nevertheless, the variety of devices and applications run by those devices makes it extremely unlikely that an entity would be able to centralize the storage of every document. However, to whatever extent centralized storage is possible (for e-mails and word processing documents, at the very least) it should be employed. Furthermore, uniform procedures for storing and retaining non-centralized electronic documents should be implemented and enforced in order to maintain an orderly collection of documents that can be efficiently reviewed as necessary for normal business use as well as for production in response to litigation document requests.

4. Halting Backup and Archive Deletion

A party that receives a document request, whether as a litigant or as a third party, must be careful not to delete, overwrite, or alter responsive documents. In particular, a document request recipient that engages in routine rotation or destruction of archival and backup data must interrupt normal cyclical erasure procedures, even if erasure would otherwise be proper in the normal course of business. The penalty for spoliation (failure to prevent loss or destruction of responsive documents) may be severe – it can lead to sanctions as extreme as negative disposition of a material claim⁶ or default judgment,⁷ especially if the party that lost documents acted with gross negligence, recklessness, or intention in failing to preserve the documents. Less severe sanctions of adverse inferences, fines, costs, and fees may also be imposed.⁸

5. Reviewing for Privilege and Confidentiality

As with any document production, it is crucial that a party review any responsive documents to ensure that it does not divulge confidential trade secrets or attorney-client communications. Any document production carries the risk of waiving the attorney-client privilege or betraying trade secrets through inadvertent production of otherwise-protected documents, but electronic document productions heighten that risk – especially when producing a mountain of e-mails with myriad attachments.

Sound review practices for electronic documents include use of computer software designed specifically to analyze e-mails and other electronic documents and convert them, including all their “metadata” and otherwise hidden data, into a more easily reviewable and field-searchable form. Using such software not only protects against inadvertent production, it also helps to lay the foundation for arguing in court that any waiver of privilege or confidentiality that might be implied by inadvertent production be excused. In determining whether such waiver ought to be excused (and whether inadvertently produced documents ought then to be returned), courts consider various factors, but require at a minimum that the producing party had exercised reasonable efforts to avoid inadvertent production.⁹

6. Producing Responsive E-Documents

If responsive documents cannot be withheld based either on the disproportionate burden of producing them or on their confidential status, a party subject to discovery requests is obliged to produce the documents in a timely manner. Sanctions for failure to produce in a timely manner are generally not as severe as for spoliation, discussed above. However, in certain circumstances, a party that fails to produce responsive electronic documents may be precluded from presenting evidence on the issue related to the unproduced documents.¹⁰ More typically, a party that fails to produce responsive electronic documents or accurately disclose its ability to access electronic information in a timely manner will be sanctioned by requiring the payment of costs, attorney fees, and/or fines.¹¹

In Conclusion

The procedures for responding to electronic document productions are similar to those for a conventional paper document production. However, the sophistication of electronic documents and electronic document retention systems presents additional challenges, considerations, and opportunities that merit close consideration when a document production encompasses electronic documents. Focus early on the central production issues for your electronic documents (evaluating for undue burden, seeking expense sharing, halting document deletion procedures, locating responsive documents, reviewing for privilege and confidentiality, and producing your information in a timely manner), and as your litigation matter progresses you will be in a significantly better position to focus on the substantive issues at hand.

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² See, e.g., Van Westrienen v. Americontinental Collection Corp., 189 F.R.D. 440, 441 (D. Or. 1999).

³ 2002 U.S. Dist. LEXIS 7792, at *18-*19 (D. Del. Apr. 30, 2002).

⁴ Compare In re Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 15, 1995) with Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7th Cir. 1998) with Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 U.S. Dist. LEXIS 563 (S.D.N.Y. Jan. 23, 1996).

⁵ Rowe Entertainment Inc., v. The William Morris Agency, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

⁶ See Residential Funding, 306 F.3d 99 (2nd Cir. 2002).

⁷ See Cabnetware, Inc. v. Sullivan, 1991 U.S. Dist. LEXIS 20329, at *3-*6 (E.D. Cal. July 15, 1991); Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990).

⁸ In re Prudential Ins. Co. Sale Practices Litig., 169 F.R.D. 598 (D.N.J. 1997); RKI, Inc. v. Grimes, 177 F. Supp. 2d 859 (N.D. Ill. 2001); Linnen v. A.H. Robins Co., 1999 Mass. Super. LEXIS 240 (June 16, 1999); see also Danis v. USN Communications, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. 2000).

⁹ See, e.g., Ciba-Geigy Corp. v. Sandoz, Ltd., 916 F. Supp. 404 (D.N.J. 1995).

¹⁰ See, e.g., Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1381-84 (7th Cir. 1993); DeLoach v. Philip Morris, 206 F.R.D. 568, 573-74 (M.D.N.C. 2002).

¹¹ See, e.g., GTFM, Inc. v. Wal-Mart Stores, 2000 U.S. Dist. LEXIS 16244 (S.D.N.Y. Nov. 9, 2000); National Assn. of Radiation Survivors v. Turnage, 115 F.R.D. 543, 554-60 (N.D. Cal. 1987); Fautek v. Montgomery Ward & Co., 96 F.R.D. 141, 144-46 (N.D. Ill. 1982).

