

The e-discovery edge:
Expertise and preparation can save millions*

Imagine having to produce every e-mail you've sent or received in the past year, including ones you've deleted. Then add every spreadsheet or word-processing file you've created. Then multiply that task by the number of employees in your company — 100, 1,000 or 10,000 times. Then tack on the tremendous pressure of a legal decision hanging in the balance.

Where would you start?

If you're smart, you'd turn to Document Technologies, America's fastest-growing document outsourcing company. Staffed by highly trained professionals with extensive corporate and legal experience, Document Technologies is uniquely qualified to handle even the most complex electronic discovery challenges.

Companies are quickly finding that electronic discovery (or "e-discovery") is becoming one of the most critical aspects of litigation. Because nearly every document is today created electronically, even if it is sometimes later printed out on paper, the pool of documents available for e-discovery is vast. If you're in business, chances are you will have to deal with the issue of e-discovery sooner rather than later. By preparing now, you can avoid the excessive cost and business disruption of complying with court-ordered data requests.

The first step is educating yourself and your company about the growing realm of electronic discovery law. Not only will this help you meet your own organization's e-discovery obligations, but it will also give you an advantage should you ever need to pursue electronic data from another party. Document

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Technologies can provide the consultation, tools and training your organization needs to assist with discovery obligations and opportunities.

Here's an overview of what you need to know about e-discovery:

E-Discovery Matters

First, it is important to understand why electronic discovery is important. There is no question that electronic documents are as discoverable as paper documents. What's more, because of their nature, electronic documents typically contain much more potentially relevant information than printed documents. The "metadata" of every electronic document reveals characteristics of that document such as dates, access, and other relevant information — information that may be crucial to proving a legal claim but that could be gleaned only from the electronic version of the document .

Then there are the billions of documents that exist only in electronic form, such as e-mails. Although e-mails are sometimes printed out, they usually can only be discovered electronically. As recent notorious e-mails demonstrate in cases involving Microsoft, WorldCom, and Enron, e-mail lurking in an in-box or archive file can be devastating both to a company's legal case and public image.

Electronic documents are particularly vulnerable to probing because of the relative ease with which they can be reviewed. If the documents are recovered in the most effective manner, they yield readily to powerful searches of both main document text and potentially crucial metadata that pinpoint key documents.

E-Discovery is Different

Before even receiving a document production request, every party to a lawsuit must provide to other parties a description of the category and location of all documents held or controlled. That requirement applies to all electronic documents, including e-mail, voice mail, letters, memoranda, databases, spreadsheets, calendars, address books, and all other computer files, whether the information is stored on a desktop, laptop, network, or ISP hard drive, floppy,

Jaz or Zip disk, CD, DVD, PDA, backup tape, video tape, or any other storage medium. The ease with which electronic documents can be stored and transported presents a great challenge for cataloging the full range of locations in which a company's documents are stored.

Not only do electronic documents contain more information than their paper counterparts, but they are also likely to contain earlier versions of the "final" document. Because of this embedded history, an electronic document is far more likely than its paper counterpart to be dogged by its earlier incarnations. Whether or not an attempt was made to delete earlier versions, a hard drive is likely to contain both obvious and hidden files and file fragments that contain earlier versions of documents. And word processing and other software is likely to contain a history of document edits, whether or not the user chooses to "track" changes or otherwise show edits or redlining on the screen. These earlier versions and edits may, like e-mails, contain embarrassing or legally damaging evidence.

Electronic documents contain much more metadata than just edits. An electronic document is likely to show the date it was created, the dates it was modified, the authors who have modified it, the date it was last printed, and a host of other potentially critical information – information that would not be available from the printed-out version.

The vastness and richness of available electronic information makes it imperative that a company conduct electronic discovery (both on the discovering and producing end) responsibly. As cases including Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2nd Cir. 2002) and Gates Rubber Company v. Bando Chemical Industries, 167 F.R.D. 90 (D. Colo. 1996) have shown, the selection of an insufficiently capable document management company can damage a company's efforts to win in court.

Avoiding Sanctions

Responsible electronic discovery conduct is crucial to a company's ability to obtain important evidence — and avoid court sanctions. A competent document management company can help a business avoid these pitfalls.

A company must follow reasonable document retention procedures to protect itself from spoliation of data (the improper destruction or loss of data once litigation can reasonably be anticipated). Besides identifying electronic documents responsive to particular discovery requests, a party to a lawsuit must ensure that once litigation is anticipated, electronic documents are not deleted, overwritten, or altered. In particular, a company that engages in routine archiving and rotation of backup media must prevent relevant backups from being erased, even if erasure would otherwise be proper in the normal course of business.

The penalty for failing to prevent loss of responsive documents may be severe. The failure to preserve responsive documents can lead to sanctions as extreme as negative disposition of a material claim, especially if the party that lost documents acted with gross negligence, recklessness, or intention in failing to preserve the documents.

A company may also be liable for a discovering party's costs and attorney fees if it fails to make an accurate disclosure of its electronic document holdings or fails to produce responsive documents in a timely fashion. A company is at a great disadvantage if it has not taken any steps to organize or inventory its electronic document holdings before it is served with a document request.

The Expense of E-Discovery

The cost of electronic discovery can vary, but can be especially great when documents are stored in certain backup systems that contain a vast amount of electronic information from a wide variety of applications. Costs can really soar when systems do not allow extraction of particular files or types of files.

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. A recent case employed an 8-factor balancing test for determining which party should bear the cost, a test which has been favorably cited by other courts.

With respect to sanctions, besides 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. Because accessing a document, and in some cases the mere act of turning a computer on or off, alters potentially important metadata, a party may need to cease any use of its computers until responsive hard drives are “imaged,” thereby preserving a copy of the system’s data. Similarly, the normal procedures for erasing outdated backup tapes may need to be revised while discovery is pending.

Constructing an E-Discovery Request and Pursuing E-Discovery

Courts have found certain requests for electronic document to be overbroad and therefore unenforceable. On the other hand, a company must be careful to request a sufficiently broad range of electronic documents so that it can discover all relevant information. A company should draft its electronic document requests carefully, and be prepared to object to inappropriate electronic document requests received from opposing parties.

Also, a company must conduct timely review of productions that it does receive so that it is able to follow up on leads from earlier productions. Even when productions are made by less frequently used electronic media such as Jaz disks, a party can lose its ability to take advantage of valuable information in such media if it does not analyze and act on it quickly. An experienced document management company can be invaluable in helping quickly to access any media that may be obtained pursuant to a document production.

Inadvertent Waiver of the Attorney-Client Privilege

Any document production carries the risk of inadvertent waiver of the attorney-client privilege, but electronic document productions heighten that risk.

When producing a mountain of e-mails with myriad attachments, the danger that an otherwise protected attorney-client communication may be missed and mistakenly produced rises dramatically. Such waiver may be excused, but only if, among other things, the producing party takes reasonable precautions to avoid producing privileged documents. These include review of the emails, and that review can be facilitated by the employment of software such as Discovery Cracker[®], particularly designed to access emails and email attachments and convert them into a more easily reviewable and field-searchable form.

Fulfill Obligations and Preserve Opportunities

Obviously, there are many issues to be considered with regard to electronic discovery, both in document production and document retention.

But one point is clear. It takes an experienced, knowledgeable and technologically savvy document company to provide superior e-discovery services. Document Technologies is dedicated to remaining at the forefront of the ever-evolving technologies used to produce and retain documents. We stand ready to help your company assess its electronic production obligations and take advantage of electronic discovery opportunities.