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Discover Your Inner Techie

The new federal e-discovery rules require a working knowledge of digital data

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The recent amendments to the Federal Rules of Civil Procedure (Amendments) have transformed procedures for the discovery and production of e-information by promulgating protocols for digital data. In addition to recognizing digital data as its own discoverable entity, the amendments allow more effective management of e-information.

Digital data differs from traditional, hard copy data with respect to the way it is created, modified, communicated, stored and destroyed. Understanding the underlying technology of digital data is useful in applying the amendments. Digital data allows data copies to be as good as original data, consequently digital data is rarely moved; rather it is

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remotely replicated. Sending digital data normally results in one computer sending a signal which causes other computers to duplicate the data. A copy of the data is replicated on the recipient's computer and an image of the data is displayed on the recipient's screen. Thus, viable copies of documents can be produced from multiple locations.

Understanding a bit about the computer software that facilitates the communication of digital data will also assist in understanding who is most affected by the amendments. In particular, when an e-information recipient or a sender uses a computer "Delete" key, the e-information is not in fact actually deleted. Those who use the amendments must know that the use of the "Delete" key merely changes the e-information's name and internal references. Consequently, copies of the "deleted" material may be recovered from the computer used to delete the digital data.

Deleted files may also be recovered from third-party computers. In the unlikely event that digital data is in fact deleted on one computer, the e-information is likely to be found intact on another. In addition to the content of the "deleted" material that may be available on a third-party computer, e-data about the e-information may also be found on the computer from which the content was deleted as well as third-party computers. Such information typically includes e-information or metadata regarding where and when

the digital data was stored, retrieved, viewed, managed and communicated. Third-party computers may also include computers that copy all digital data for the purpose of data recovery in the event of a technological catastrophe.

Past litigation has been plagued by a party's inability to access electronic data due to surrounding issues with both volume and accessibility. These problems are largely due to the fact that electronic data is commonly stored in formats that promote operational recovery, but must be modified at considerable expense before it can be determined whether it is relevant to the lawsuit. Consequently, in some instances, the benefits of electronic information may be less than the cost of making it accessible.

In addition to technical accessibility, the effective use of e-data is also limited by ownership issues. Ownership of traditional records is usually clear. The party in physical possession of the records is likely to know what they have and what their responsibilities are as custodians of documents. Since e-information may be left on each computer it passes through, the issue of originality, as addressed under the Best Evidence Rule, is now rather obsolete with regard to digital data.

E-information, unlike typical, traditional hard copy information, has several levels of custodianship. The first level includes those with access to the original data. They include people who work with the data directly and are able to see, edit and send the data. Most users of the e-information would fall into this category of custodian.

The second tier of e-information custodians consists of individuals who facilitate the production, modification and transfer of the e-data. A help desk employee exemplifies the type of person in this group. They normally are not aware of the content of the e-information, but are aware of its existence. They may not know what A's e-mail to B says, but they know A sent B an e-mail.

Third-tier custodians are comprised of information technology staff. These individuals are the physical custodians of the active electronically stored information. They most likely do not know that A sent B an e-mail, much less the content of said e-mail, but they have access to it. This group of owners also includes third parties who are outsource contractors and include Internet Service Providers (ISPs) such as America Online who provide essential connectivity and computer services, but are also holders of the consumer's e-mail, traffic records, and other important data.

Due to the inherent nature of electronic evidence, members of each of the three tiers would have access to the same data. The implications of this mass custody of discoverable information are far-reaching. Taking this structure into account, the amendments attempt to address many of the problems associated with the discovery of electronic information.

The amendments to the Federal Rules of Civil Procedure begin by redefining Rule 34 and identifying electronically stored information as a discoverable body of information, thus assigning the same importance as the discovery hard copy

documents. Traditionally, Rule 34 addressed the discovery of tangible documents, such as writings or photographs. The amended Rule 34 expands the scope of discovery to intangible data, including electronically stored information, thus making data a tangible entity for purposes of litigation. The new rules also expand what electronic information is discoverable by making all electronic data discoverable unless limited by order of the court.

Rule 34 (b) further permits a party to request the form in which the electronically stored information will be produced. As a consequence of this subsection, attorneys must not only become conversant in various computer file formats, but must also negotiate with their adversaries about how these files will be uniformly produced.

Similarly, the scope of Rule 26 was changed to include electronically stored information as part of the requirement of early disclosure. Adverse parties are now required to meet and confer early in the discovery phase and discuss and disclose the nature of the electronic evidence that will be produced. This in turn changes the agenda for the Rule 16(b) pretrial conference.

In addition to the "meet and confer" requirements of the amendments, changes in the accessibility of information will also be implemented. Along with data that is routinely accessed in the ordinary course of business, the new rules will require archived data to be liberally produced. Such data had traditionally been shielded from discovery because it was considered

to be in a form that was "not reasonably accessible." In short, Rule 26(b)(2) redefines the meaning of "accessibility." The inaccessibility of any data source must now be demonstrated and may no longer be attributed to a cost-shifting factor.

Many third parties hold electronic data for litigants, due to extensive use of third part data processors used by both businesses and individuals. Although not parties to the action, they face the same questions of preservation, cost, privilege and form-of-production. Court rules thus tend to relieve nonparties from "substantial" costs related to the production of records, a much lower threshold than the "undue burden" standard of former Rule 26(b)(2), renumbered Rule 26(c).

The amendments significantly alter traditional discovery practices by requiring parties to litigation to recognize electronically stored information as a separate but equally important category of information to be discovered. Attorneys must now become conversant in computer languages that may once have been foreign to them. In addition, a great deal of emphasis has been placed upon cooperation among adversaries. Should a party in negotiations not be properly prepared and adequately educated on the topic, they run the risk of both damaging their suit by putting their adversary in an advantageous position, or being sanctioned by the court for not cooperating to the level set by these new standards. Both scenarios should motivate litigators to take a closer look at the amendments and give them the attention they require. ■