

E-Discovery: A Tech Tsunami Rolls In

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A Background Paper

By Judith Sears

Discovery is the phase in which counsel prepare for their case by gathering all evidence and witness testimony. It requires attention to detail and forward thinking before entering trial proceedings. E-discovery is a new term that refers to the electronic process in this phase, such as scanning documents and pictures to show in court. Some court reporters are involved in this process and others are not. Either way, it is beneficial as a court reporter to be familiar with discovery as further knowledge about the legal process will increase your credibility and place you in high standing with counsel. The e-discovery process involves newly developed technology, and being familiar with these recent changes will prove advantageous in the court reporting field as technology continually advances.

Introduction

It's a scene out of a dramatic courtroom movie — or someone's worst nightmare. The witness, a corporate executive, swears under oath that he has never seen or received a specific document. The plaintiff's attorney moves in for the kill, displaying a Microsoft Excel spreadsheet, sent as an e-mail attachment, which the witness had received from a colleague. The spreadsheet is manipulated on a monitor for the entire courtroom to view the potentially incriminating information about the corporation's plans for dealing with an ex-employee.

This courtroom drama actually happened in 2004 with Michael DeMane, president of Medtronic Sofamor Danek, Inc., on the witness stand. The electronic discovery of the e-mail and the attached spreadsheet was evidence that DeMane had, in fact, received the document. Medtronic subsequently lost the patent suit and settled with the plaintiff, Gary Michelson, regarding Medtronic's use of Michelson's inventions.

The Medtronic case is one of the simplest and most notorious examples of the increasing impact of electronic evidence. And, it's just one of many high-tech dramas coming soon to a courtroom near you, courtesy of electronic evidence.

Tip of the Iceberg

The changes that computers and electronics have brought to the business world are all around us and have been for more than two decades. Most professionals send and receive dozens of e-mails daily, not to mention instant messages, text messages, and voice mails. "Electronic business processes have completely overshadowed the old paper business processes," says Ken Withers, managing director, The Sedona Conference (www.thesedonaconference.org), a nonprofit think tank with a working group dedicated to e-discovery. "Twenty years ago, the computer simply sup-

ported a paper business process. Now, the computer is the business process. There may not be any paper involved or the paper is simply the tip of the iceberg."

As it happens, electronic evidence is an iceberg that's growing exponentially. Experts estimate that 93 percent of today's documents are created electronically and approximately 30 percent are never printed. Yet, the courts and the legal profession have been somewhat slow to realize just how big the electronic iceberg is and how the nature of evidence is changing.

"Two years ago when I talked to people and asked if they got e-mail as a part of their discovery request, many times the answer was, 'no,'" says Joe Utsler, software evangelist for Dataflight, a litigation support software firm. "Think about that: if somebody wanted all of your communication but didn't want your e-mail. I can count on my hands the number of letters I've sent in the last 12 months."

Wake-Up Calls

While the initial response of the legal community to the impact of digital and electronic technology on the legal process may have been slow, that process is speeding up, observers say. Some recent, notable cases have jolted the legal profession into taking action. *Zubulake v. UBS Warburg*, 220 F.R.D.212 (S.D.N.Y.2003), an employment discrimination case, resulted in a jury verdict of \$29 million for the plaintiff. A key outcome of *Zubulake* was the judge's ruling that "there is a duty to preserve evidence that parties know, or should know, is relevant to ongoing litigation, including preservation of electronic data." *Zubulake* quickly became a landmark in e-discovery case law and the "black and white" law of preserving electronic evidence has been widely noted.

Subsequently, a 2005 case in Florida resulted in a \$1 billion dollar judgment against Morgan Stanley (*Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*). The judge's ruling in this case included the observation that Morgan Stanley had not produced electronic documents with appropriate attention to preventing spoliation of evidence.

Full Disclosure

In both *Zubulake* and *Morgan Stanley*, the judges ordered the juries to draw an adverse inference about the defendant's conduct in not preserving and producing electronic documents appropriately. This attention to e-discovery processes gained widespread notice. "Those two cases and the jury verdicts woke up the corporate community to e-discovery," says Courtney Barton, vice president of industry relations, Applied Discovery, LexisNexis. "It was suddenly something to be taken very seriously."

In fact, the volume and nature of electronic evidence insures that a discovery process that doesn't include electronic evidence isn't complete. In an article published in the *JCR*, February 2006, Justice B.T. Granger explained how purely paper processes leave out crucial evidence:

"If counsel are only required to disclose hard-copy documents, many relevant documents that have never been printed will not be disclosed; and even if such documents are produced in hard copy, the recipient will be unable to access the metadata that forms part of the electronic document. As a result, disclosure in hard copy is less than full disclosure if the document was initially created in an electronic format."

Dataflight's Utsler agrees: "E-discovery has gone from being this nebulous thing that people were talking about, but few doing anything about, to becoming core and essential."

The tide, then, has turned and courts are recognizing how essential e-discovery is. In fact, increasingly, attorneys who don't make appropriate e-discovery requests for their clients or who don't provide effective counsel for responding to e-discovery requests are facing sanctions from the courts.

Back to School

These developments have spurred attorneys, some of whom may have lacked technological literacy, to realize that the mysterious gigabytes of computer files can't be ignored. Attorneys and courts alike are going to school to become more computer literate. "The lawyers, paralegals and litigation support managers are all moving feverishly to come up to speed on the technology itself and begin to understand what can be done," says Mark Hawn, founder and president of OnSite eDiscovery, a litigation support services provider.

"It's had a monumental impact," says Michele Lange, staff attorney, Legal Technologies, KrollOntrack. "Winning and losing a case today can hinge on evidence buried in a computer somewhere."

A Different Animal

The e-discovery process that is making such waves has been defined by The Sedona Conference as "the discovery of electronic documents and data."

While that definition sounds simple and straightforward, in practice, e-discovery is anything but. Just understanding the ways in which electronic evidence differs from paper and other physical evidence presents significant legal and intellectual challenges.

As the legal community has begun to focus on electronic evidence, experts have quickly realized that electronic evidence is a different animal from conventional paper discovery. In his book, *Electronic Discovery and Evidence* (Law Partner Publishing, 2003), attorney Michael Arkfeld has identified several unique characteristics of electronic evidence. Some of these characteristics include:

- **Informality.** E-mail, in particular, often involves spontaneous and unguarded comments, as opposed to what an individual might write in an official memo. Sometimes, the informal nature of e-mail correspondence may seem

particularly revealing of an individual's thought processes. However, it may also be an incomplete picture or one subsequently altered, when the individual had additional information or perspective.

- **Metadata.** Electronic files contain not just the information that the individual creating the document entered; it also contains data generated by the computer or software itself, such as when the document was created, by whom, when revised, etc. E-mail metadata, for example, can show who was blind copied and who opened and viewed a message.

- **Preservation.** It's harder to preserve electronic information. In the daily use of booting up a computer or opening a file, for example, previous metadata can be altered or eliminated, purposely or otherwise.

- **Deletion.** Electronic data is not easily destroyed. Deleting documents, for example, doesn't actually destroy them and the use of computer forensics may be able to retrieve those documents. Additionally, e-mails and e-mails with attachments send documents onto others so that even if the document should be destroyed on the sender's computer, a version may well exist elsewhere.

- **Multiple storage locations.** Electronic data can be stored in a dizzying array of places and in farflung locations. It may be stored on personal digital assistants, voice mail, chat rooms, CDs, Web sites or on a server thousands of miles from the custodian of the information.

- **Disorganized.** You only have to look at your own computer or e-mail files to realize that electronic information is rarely stored tidily in directories, sub-directories, etc. And, storage practices can be inconsistent from one individual to another.

- **Volume.** Arkfeld and others note that the sheer volume of electronic information being generated today is overwhelming. Arkfeld observes that 10 employees receiving 30–60 e-mail messages a day adds up to 300–600 daily e-mails and can easily escalate to 60,000–120,000 messages per year. "What was once a five-box case has become hundreds of gigabytes of information or even terabytes," Utsler says.

Data About Data

Of all of the unique characteristics that distinguish electronic evidence from paper or other physical evidence, the most talked about, and in some ways the most significant characteristic, is metadata. Metadata, sometimes defined as "data about the data," is unique to electronic evidence. Metadata can be generated in many ways and about many different things. In a Microsoft Word document, for example, the metadata can reveal, among other things, information about when a document was created and by whom, as well as when it was last modified.

Microsoft's Excel program has already gained a reputation among legal observers for the way in which the metadata generated and contained within the electronic version of a spreadsheet is so much more voluminous and can differ so radically from a paper print-out of the identical spreadsheet.

For example, a printed version of an Excel spreadsheet will show just the numbers in the cells. However, an electronic version of the same spreadsheet can be manipulated to show the formula that was used to arrive at the numbers. In some cases, the underlying formula is more revealing and has more probative value than the numbers. “Often how the results are arrived at is just as important as the results themselves,” observes George Socha, attorney and principal of Socha Consulting, LLP (www.sochaconsulting.com), a thought leader on the implications of electronic evidence.

Re-thinking Evidence

Metadata in which the electronic and printed versions of documents differ is only one example of how electronic evidence differs so substantially from conventional, physical evidence. And, it demonstrates that electronic evidence will result in more than just a newfangled twist on the same old discovery processes. In addition to different procedures, electronic evidence is prompting the legal profession to re-think the nature of evidence.

One of the most fundamental questions, according to Ken Sokol, product manager for Electronic Evidence Discovery (www.eedinc.com), an e-discovery litigation support firm, is whether documents are submitted as “static” files or in “native format.” Static files are images of the original document, usually either a TIFF or PDF file, which are essentially a snapshot. “Native formats” are the source documents and/or a document saved in the format of the original application used to create the file.

“The predominant model for e-discovery is to convert evidence to an image,” Sokol observes. The challenge — and it’s increasingly apparent to the courts — is that there’s a great deal of information beyond the image of the document.”

Artifact to Process

Along these lines, the Sedona Conference’s Ken Withers believes that the legal field is moving from thinking of evidence as “artifact” to a “process.” He points out that many times a paper document is more accurately thought of as a snapshot of a business or electronic process. Withers observes that amendments to federal rules of civil procedures in the last few years have begun to deal with the unique nature of electronic evidence. He expects continued development in this area. “These new rules will recognize that paper is just one mode of presenting information and that the goal of discovery and the goal of presenting evidence at trial is to present information in whatever form is most appropriate,” he says.

Withers notes that this new conceptualization of evidence represents a sea change in our thinking — from thinking of evidence as a thing, an artifact, to thinking of evidence as a process, such as a computer program. “In the past we had a very artifact-centric approach. In the trial the attorney approached a witness with a piece of paper and asked if the witness could identify the signature,” Withers explains. “Now, we don’t have any artifacts. The artifacts at best represent a snapshot. The witness isn’t being asked

about the artifact as evidence but as a product of a process,” he concludes.

An E-Discovery Model

The unique characteristics of electronic evidence have made it challenging to devise appropriate e-discovery procedures. It’s become apparent that a simplistic modeling of e-discovery procedures on traditional discovery procedures won’t work. But, there’s no consensus yet on what e-discovery procedures should be. Procedures vary from case to case and jurisdiction to jurisdiction. “This is just a rat’s nest. There are no standard practices yet, as far as I know,” says George Socha.

“We’re all making this up as we go along,” concurs Withers. “Different courts are coming up with different solutions. It’s all over the map.”

To attempt to fill the void, Socha and Peter Gelbmann, managing director of Gelbmann Associates, an IT consulting firm, are collaborating on a project to develop standards for e-discovery procedures. They’ve established a Web site, www.edrm.net, dedicated to developing an electronic discovery reference model. Their current model identifies nine distinct steps in the e-discovery process: records management, identification, preservation, collection, processing, review, analysis, production and presentation. Socha and Gelbmann have been inviting comments and discussion to help develop the standards and plan to place the completed model in the public domain in May 2006.

In addition, the Sedona Conference’s e-discovery work group has established Special Projects Teams which are addressing issues such as e-mail management and archiving, legacy data, legal holds, and search and retrieval issues. In 2005, the e-discovery work group released The Sedona Principles, which provide a working framework for electronic document production. The principles cover issues such as the proper way to make discovery requests, what the primary sources of electronic data should be, and how responding parties can demonstrate meeting their good faith obligation.

Taking Stock

While the many philosophical and methodological questions may puzzle the legal community for years to come, court reporters have to begin to take stock of what this means for their profession.

Ironically, in some respects e-discovery hasn’t had an immediate impact on court reporters. Many e-discovery decisions occur prior to trial and deposition. The court reporter, for example, may not need to be concerned about what e-discovery rules were used to identify which servers and information custodians were determined to be responsive to a discovery request. However, the court reporter will often be transcribing arguments about what evidence is discoverable. And, the court reporter will inevitably be involved in some manner in transcribing the presentation of electronic exhibits in court as well as marking those exhibits. Therefore, court reporters are well advised to acquaint themselves with the basic issues at stake.

First Steps

“Court reporters are going to encounter discovery motions and fights between parties about what should be produced,” says James Lehman, attorney and vice chair of the e-discovery committee of DRI, a national organization of defense trial lawyers. “There will be discussions about gigabytes of information and back-up tapes. The court reporters need to be familiar with the nature of electronic evidence, such as where you get electronic documents and how they are maintained and discovered. When the parties are fighting over who is going to produce what, the court reporter needs to have a general understanding of the topic to record it accurately.”

It’s no small challenge to stay up to date on technology. Michele Lange, attorney with KrollOntrack, observes ruefully that she sympathizes for those in the courts who must listen to the testimony of some IT experts. “They are very technical and they talk about things that are very complex. So, they’ll say something like, ‘I imaged the drive and de-duplicated the e-mail archives.’ Seventy-five technical words later the layperson is wondering what this person is talking about and what they did.”

Nevertheless, a necessary and straightforward first step for court reporters is to keep educating themselves on computer technology and e-discovery principles, at least in terms of having a general understanding with the topic and an

acquaintance with the terminology. In addition, court reporters will want to put the new terms in their dictionaries.

Terms to Know

Some commonly used terms and their definitions have been supplied by Kroll Ontrack’s Michele Lange and are included in the sidebar. In addition, court reporters can find other, more exhaustive glossaries online at www.edrm.net and the Sedona Conference (www.thesedonaconference.org).

Marking Exhibits

What many court reporters are already encountering, or will be shortly, is the need to mark electronic exhibits. At first glance, marking exhibits seems to present a conundrum. For example, in the case of the notorious Excel spreadsheet, the printed out spreadsheet may not be, in fact, the evidence. Instead, the “hidden” cells that hold the formula that produced the numbers may be the evidence to be submitted.

First, recognize that court reporters aren’t primarily responsible for these decisions and don’t need to feel that they have all the answers. Attorneys and judges may well have directions and most often should be the ones making the call about what should be marked as evidence. In fact, many experts point out that the first responsibility lies not with court reporters, but with attorneys to clarify exactly

Common E-Discovery Terms

Active Data: Data that is immediately accessible to an individual using a computer (i.e., word processing and spreadsheet files, programs and files used by the computer’s operating system).

Archival Data: Information maintained for long-term storage and record keeping purposes (i.e., data stored on backup tapes or disks, usually for disaster recovery purposes).

Backup Tape: Portable media used to store data not presently in use by an organization; frees up storage space while still allowing for disaster recovery. Also known as “off-line” storage media.

Bit and Byte: A bit is the smallest unit of data stored on a computer and has a single binary value, either a “1” or “0.” A byte is a collection of bits used by computers to represent a character (i.e., “a”, “1”, or “&”). 1 gigabyte

= 1,000 megabytes; 1 terabyte = 1,000 gigabytes

Cache: A type of computer memory that temporarily stores frequently used information for quick access.

De-Duplication: the process of comparing and removing duplicate electronic documents from a data set.

Deleted Data: Data previously existing on a computer as live data but that has been deleted by the user or computer system. Deleted data will remain on the computer in whole or in part until it is overwritten by new information.

Encryption: A procedure rendering file or message contents unintelligible to unauthorized individuals.

Metadata: Information describing how, when and by whom data was received, created, accessed, and/or modified (e.g., the “to,”

“from,” “cc,” “bcc” fields on e-mail, or the “date created” and “date last accessed” fields on files).

Mirror Image: A bit-by-bit copy of a computer hard drive. A computer forensic examiner will conduct an investigation on a mirror image, ensuring the original hard drive is not altered during the investigation.

Native Format: Refers to documents in the original file formats in which they were created, including the specific software applications used to create each individual documents (i.e., a Microsoft Word file’s native format is “.doc”).

Spoliation: Spoliation is the destruction of potentially relevant documents during ongoing or anticipated litigation, a government investigation or an audit.

what it is that they are submitting as evidence. At this stage, the court reporter can provide invaluable help by being able to provide options and by asking questions that clarify critical decisions that are being made about the evidence.

“The lawyers have to become more skillful about identifying for the record what they’re saying,” says Stuart Sobel, attorney with Siegfried, Rivera, Lerner, De La Torre & Sobel, a law firm based in Coral Gables, Fla. “They need to say if they are identifying the cell (of the spreadsheet) or the formula. The court reporter is just making a verbatim transcript.”

Just Ask

Ken Withers, of the Sedona Conference, emphatically agrees. “The court reporter has to be very careful to be in communication with the attorney as to what the evidence is. Is the evidence the paper print-out or is the evidence the computer program that generated the result? And, attorneys don’t know this and don’t understand that they have to narrowly define what they are trying to get into evidence. Only then can the court reporter say, ‘we’re marking this screen shot or pdf or static image’ and if so in what form — a disk, or a hard drive.”

One of the simplest solutions — and a completely low-tech one — is to simply ask the attorney to describe what it is they’re doing during an electronic presentation. In fact, Withers urges court reporters, if necessary, to stop the proceedings and ask the attorneys, “What is it you would like me to mark?”

Commonsense Rules

While processes and expectations may be in flux for a while, there are some commonsense rules that reporters can follow. Marilyn Marquardt-Sanchez, NCRA president and court reporter in the U. S. District Court for the District of Arizona, notes that currently very few electronic files are entered into evidence in native format. “They are usually locked down as TIFF or PDF images and then Bates stamped,” she observes. “If the metadata are relevant, they are captured as a separate imaged document or memorialized by the testimony of the witness authenticating the document.”

This “static” means of handling the marking of electronic exhibits can include taking a screen shot of the metadata and/or burning a CD of the exhibits for each party. In an article published in the *JCR*, November–December 2004, Nancy Hopp, former court reporter and court reporter liaison for Summation Legal Technologies, describes a hypothetical case in which a witness is testifying regarding a document they have authored. The metadata identifying the witness is on a display screen. Hopp suggests that a screen shot of the computer screen can be taken and printed on a portable computer. The printed screen shot can then be marked and submitted as exhibit A-1. Additionally, the court reporter can burn a copy of the examining party’s CD-ROM and mark it as exhibit A-2.

These procedures treat evidence as “static,” as opposed to the dynamic processes that Withers believes are the future

of much evidence. Nevertheless, they are practical and should be technologically feasible for most court reporters. They should also handle the most common situations that court reporters will face in the near future.

Equipped for the Future

To be equipped to handle electronic evidence in the near future, Hopp recommends the following technology list for court reporters:

- Computer for displaying documents
- Monitor or LCD projector
- Software to view an electronic document; e.g., Word, Outlook, Excel
- Software for converting electronic evidence from “native” to PDF or TIFF
- Software for viewing image files in PDF and TIFF formats
- CD burner
- CD-ROM or DVD drive
- Scanner for converting paper documents
- Printer for producing a hard copy of an electronic document.

Virtual Justice

Many experts stress that court reporters should also be quickly moving to equip themselves to provide realtime transcript feeds. Judge Granger describes the benefits of realtime transcript feeds for trial judges: “This enables the judge to view the testimony of the witness in text format, thereby relieving him of the burden of note-taking. As a result, the trial judge is able to organize and critique the testimony as it is being delivered in the courtroom.”

Another technical update that court reporters should be looking into: broadband access. Attorney Michael Arkfeld, who believes we’re moving into a “virtual justice system,” urges court reporters to quickly move to including broadband access in their arsenal for realtime reporting or transmitting the audio portion of a deposition. “You’re seeing all prongs of the justice system move up the ladder at the same time, and court reporters have to be part of this transition,” Arkfeld said in an interview published in the *JCR*, November–December 2004.

Exhibits and Transcripts

Arkfeld also strongly recommends that court reporters offer the service of automatically linking to exhibits in the electronic transcript. The attorney points out that this service is in high demand, but not yet widely provided by court reporters. “The electronic deposition transcript ... should have the exhibits scanned and linked to the testimony where they are referenced. Most court reporters do not offer this service and you’ve got such a significant group of attorneys now that have to start using litigation support software — because of the growth of electronic discovery — that this service should become commonplace.”

Shawna Childress, who runs a court reporting agency in Florida, observes that the benefits of providing automatic exhibit links in transcripts can be tremendous since they

enable attorneys to simultaneously view exhibits with testimony and also search transcript text for relevant testimony. “Once you do this your clients will be happier,” Childress says. “It’s an added benefit to what the court reporter provides them.”

Tech Tsunami

The e-discovery wave is irreversible and it’s going to be a tech tsunami. John Correggio observes that court reporters who aren’t on top of the technology may have to turn down lucrative business unnecessarily. “That’s a lot of money to walk away from,” he says.

For those court reporters who are intimidated by too much technology — or still trying to get up to speed — Shawna Childress suggests networking locally to identify litigation support firms they might partner with. “For some court reporters, trying to bring all of this technology in-house can be cumbersome and overwhelming,” she says. “Go ahead and rely on someone else and partner with them.” Childress suggests contacting litigation support firms before you have a prospective client to get an understanding of the services and pricing; e.g., copying, scanning, or trial presentations.

However, while there’s a lot of technology to keep up with and new procedures to become accustomed to, few observers think that the digital revolution spells the end of the court reporting profession any time soon. Even with voice recognition software, for example, court reporters still fill irreplaceable roles.

Court reporters can distinguish between six attorneys who are arguing with each other, for example. Stuart Sobel, attorney with Siegfried, Rivera, Lerner, De La Torre & Sobel, in Coral Gables, Fla., bluntly believes that court reporters are far superior to the digital alternatives. “I just don’t think there’s any substitute for a human being who can stop people from talking over each other and read portions back,” he says. Court reporters can also authenticate files and testify in court, which computers won’t be doing any time soon.

A New Role?

In fact, Ken Withers believes that court reporters will actually become more important, but he sees their roles as changing somewhat. Withers believes the court reporting profession may evolve into that of a neutral evidence manager.

“The court reporter won’t simply be that silent person in the front of the room who is taking down verbatim the conversation,” he says. “It’s going to be the trusted, neutral third party who manages the evidence. The courts have to have someone that all sides are willing to hand over artifacts to and trust to bring it all together,” Withers concludes.

In some respects, then, the court reporter role may eventually morph into a litigation support role — except as a trusted third party, not as support to one party or the other. Staying on the cutting edge of technology and e-discovery may be a challenge, but it may also give the court reporting profession new horizons and opportunities.