

TOP TEN CONCERNS ABOUT E-DISCOVERY IN LITIGATION

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Roughly, 92 percent of all new information created exists in digital or electronic form. About 99 percent of businesses use email, but only 39 percent have a formal email retention policy. These tendencies with respect to digital information create significant risks if litigation arises.

Hundreds of legal and practical concerns exist concerning electronic data, but employers should consider at least these top 10 issues:

1. **Best Practices.** Lawyers and judges have begun standardizing various conventions and expectations for the discovery of electronic data when litigation commences. An employer's failure to follow these best practices could have devastating impacts on an employer's ability to prevail in any civil litigation.
2. **Electronic Documents Never Disappear.** A forensic expert can likely recover virtually any document from a computer hard drive. During litigation, an employer may have to produce thousands of documents hiding on old hard drives as well as documents in current systems. The "E" in email usually stands for "eternal."
3. **Sources of Electronic Data.** Electronic documents may lurk on personal computers, laptops, thumb drives, Blackberries, Personal Digital Assistants, "smart phones," iPads, cell phones, various computer servers, and other locations. When litigation begins, employers may have to search all of these information "haystacks" to find the helpful information "needles" to support a claim or defense. Counsel may have to interview IT custodians; learn information system architecture; identify electronic storage devices; and identify all applicable servers and mapping in order to represent the employer adequately.
4. **Now-Not Later.** In many federal and state courts, parties must obtain and exchange information about electronic documents and systems soon after the litigation begins. Eventually, parties may have to exchange voluminous electronic data and documents. These requirements place tremendous pressure on parties and their counsel as litigation progresses. Employers should design their IT systems now to recognize the possible need for retrieval later.
5. **Focus on the merits.** The failure to address electronic discovery issues may become a trap for the unwary. The focus of the litigation could shift from the merits of the case to the manner in which discovery occurs. To avoid the trap, or to spring the trap on an opponent, employers must deal with these issues at the outset of any case.

6. **Paper and Electronics.** Paper documents will still need to be collected, managed, reviewed and produced in litigation. In many cases, digitizing paper documents may represent the most convenient and cost-effective way to manage paper documents. This approach to managing paper documents during litigation is not without its costs and pitfalls, however.
7. **Do-It-Yourself Electronic Discovery.** An employer's in-house IT department may have the capacity to collect documents. Yet, the IT department may lack the experience necessary to preserve the chain of custody, protect metadata, and provide testimony regarding the document collection process. To avoid spoliation of evidence, assure document integrity, protect metadata, and provide testimony, an employer may need to hire an outside IT expert. In certain cases, IT experts may also provide document review platforms, sophisticated programming, decryption, forensics and other services.
8. **Expert Selection.** An employer or its counsel might have to interview several computer forensic experts to find the right computer forensic experts and to find the right testifying computer expert for the case. Finding the right fit of technical expertise and testimonial experience for the nature and risk in the case may prove difficult and time-consuming.
9. **Apples and Oranges.** Although best practices regarding e-discovery have emerged, no definitive standard for comparing IT experts' pricing models exists. Each IT expert's technology, methodology, and pricing strategy may vary from every other expert. Employers should request standard pricing models such as a per gigabyte price or a per page price.
10. **What about the other guys?** Opposing parties should seek to negotiate reasonable stipulations for e-discovery to avoid the electronic data equivalent of "mutually assured destruction" though discovery. Those rules of engagement should consider:
 - Paper and electronic collections,
 - Exchange of basic system data,
 - Discovery of back up and archival data,
 - A common document production format,
 - Methods to deal with native format documents,
 - Document marking,
 - Privileges,
 - Databases,
 - Redaction, and
 - Dispute resolution.

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