



The 4 Ws of Electronic Discovery

As electronic discovery is of critical concern in nearly every litigation, it becomes important for attorneys to have a clear understanding of the role electronic discovery plays and how to ensure their clients not only gain access to the information they require, but also comply with electronic discovery requests by opposing counsel.

The case law that relates to electronic discovery is constantly being updated and many courts throughout the country are developing and implementing rules for the manner in which attorneys must manage electronic discovery in all litigations. In addition, the media is constantly reporting on the purposeful and/or inadvertent destruction of relevant electronic information by organizations. Attorneys not only face the task of remaining up to date on electronic discovery, but before then can do so, they must first possess a clear understanding of the basics, essentially the Who, What, Where, and When, of electronic discovery.

Who?

The most important aspect of both drafting an electronic discovery request and understanding a request made by opposing counsel is determining the answers to:

- Who has a strong understanding of how and where electronic documents are produced and stored?
- Who is the custodian of the electronic information in question?
- Who has access to the electronic information in question?

Similarly to traditional discovery in which it is necessary to identify persons of interest, once you know the answers to these questions you will be better able to develop the proper electronic discovery strategy for each unique case. When responding to a discovery request made of your client, it is strongly recommended that the client provide you with a list of all the users who may have produced, been sent, saved, or shared the electronic information being requested.

What?

After identifying the Who, it is also of great importance to identify the types of electronic information that have been created by these users, which is necessary both when responding to or drafting an electronic discovery request. This includes identifying the types of documents created, which may include:

- Email
- Word processing documents
- Spreadsheets
- Microsoft PowerPoint Presentations
- Databases
- Specialized technical software

Having an idea of the types of documents created will assist in both gaining access to the electronic information of interest and reviewing this information after a computer forensic expert has extracted it.

Where?

Identifying the location of relevant electronic information is the next step in the process of electronic discovery requests. The electronic information that has been or is being requested may reside in a variety of locations; therefore, it is important to ascertain the following:

- Are documents stored locally on individual workstations?
- Are documents stored on the network?
- Are emails stored locally on individual workstations?
- Are emails stored on the network?
- What type of media is used to backup data?
- Where are the backups stored?
- Are removable media devices, such as CD-ROMs, DVD-ROMs, or USB keys utilized?

It is useful to gather information pertaining to the location of electronic information early in the process to help you formulate an effective electronic discovery plan and because courts tend to be more responsive to focused electronic discovery requests. When requesting electronic discovery, it is also helpful to depose the individual with the most knowledge regarding where electronic information is stored, most likely the head of the IT department, via Rule 30(b)(6). When you are the responding party, knowing the answer to the “where” questions will help your client both preserve documents and collect relevant electronic data in a cost-effective and efficient manner.

When?

It is extremely important to know the answers to the following two “when” questions in order to avoid claims of spoliation:

- When is it necessary to begin preserving electronic information?
- When was the responsive electronic information created?

As changes can be easily made to electronic information inadvertently when proper preservation methods are not employed, such as overwriting backup tapes, answering the “when” questions will help ensure that spoliation does not occur. A court is also more likely to grant an electronic discovery request that narrows the possible dates of responsive data to a reasonable timeframe. In addition, as the responding party, having an idea of when potentially relevant electronic documents were created will also assist your client in gathering this electronic information, reducing the associated time and cost.

Conclusion

Electronic discovery will continue to play an important role in litigations as businesses rely less on paper and begin to create and store more documents electronically. As an attorney, understanding the Who, What, Where, and When of electronic discovery will allow you to formulate a strong plan for both requesting and responding to electronic discovery.