



E-discovery – New Media, New Rules, New Strategies

by Michele Tourney

In the legal process, the term “e-discovery” refers to the pre-trial gathering of electronically stored information (ESI) such as e-mail messages, voice mails, websites, word processing documents, databases, spreadsheets, and digital photos.¹ Under the amended Federal Rules of Civil Procedure effective December 1, 2006, ESI is more admissible than ever—in some cases the electronic copy is the only copy deemed acceptable by the courts. But e-discovery poses unique challenges. Currently, nearly 93 percent of all content is born digital, and digital content is fair game under the new rules. One corporation recently paid thirty-one lawyers in a Denver-based firm to sift through a virtual mountain of e-documents—just to figure out which ones to turn over to the plaintiff. This task alone kept the large team busy for six months.²

Early attempts to conduct discovery on ESI were rudimentary. Records were loaded onto a separate hard drive or other media, and pertinent metadata such as “To,” “From,” “Date,” or “Document Type” were hand-encoded into a database. Discovery teams, like the one described above, reviewed each document individually for selection. This process, still in limited practice, is easily overwhelmed by rapidly growing amounts of electronic information.

Today, lawyers are turning to a new field, computer forensics, to process these massive datasets. Vendors create mirror copies of targeted data, then extract large chunks of information known as “buckets” into their specialized systems to harvest metadata and conduct automated keyword

searches. Pertinent information is funneled into a database hosted on a secured server, often with a web-based interface, making it accessible to all involved parties.

However, the e-discovery process may be streamlined further by combining old and new search strategies. Drawing upon their research experience addressing litigation issues, HAI historians can provide crucial contextual information to assist attorneys in evaluating complex and voluminous electronic records at the beginning of the review: which e-mail senders and recipients initiated discussions or exchanges as decision-makers? What was the mission or authority of the offices or organizations they represented over time? Historians can use this understanding to advise attorneys on the likely locations of relevant e-documents, helping to narrow the scope of the search. HAI historians are also keeping tabs on the growing volume of ESI found in the public domain, which is typically searched outside of the formal discovery process.

ESI is subject to the same retention requirements as paper records and requires more intervention for its continued preservation and access, but its inherent susceptibility to alteration and obsolescence creates obstacles to records management as well as discovery. HAI archivists and records managers can conduct records surveys and needs assessments to advise clients on the disposition or preservation of ESI, and make recommendations on implementing compliant management systems to ensure essential preservation of and access to authentic digital records.

¹ University of Denver Institute for the Advancement of the American Legal System, "Navigating the Hazards of E-Discovery: A Manual for Judges in State Courts Across the Nations," University of Denver , <http://www.du.edu/legalinstitute/form-navigating-ediscovery.htm> (accessed May 22, 2007).

² "Electronic Discovery: of bytes and briefs," *Economist*, May 19, 2007, 34.