

Electronic Discovery – why lawyers are still searching for the answers...

On December 1, 2006, amendments to the U.S. Federal Rules of Civil Procedure concerning the discovery of electronically stored information went into effect bringing federal courts into the digital age. The rules specify the requirements for electronic document discovery in civil cases, as recommended in September 2005 by the Judicial Conference of the US Supreme Court's Committee.

The steady flow of new technologies coming to market means that the age of the digital office is upon us. While email is the obvious electronic business communication, companies around the globe are increasingly relying on supplementary technologies. j2 Global Communications has seen a significant rise in the use of electronic faxes and this seems to be a trend that shows no sign of waning. For example, j2's eFax service, which delivers faxes straight to email inboxes, is used in offices around the globe, with hundreds of million of fax pages processed with eFax each year.

The massive take up of electronic communications in business has meant it was only a matter of time before these "e-discovery rules" came into force.

On both sides of the Atlantic, electronic information has been submitted as evidence for a number of years. Emails, electronic faxes and instant messages for example, have become a staple element of the documentation used in civil cases and their appearance at trial is only set to increase.

During the last few years, judges have made individual rulings on which electronic elements can be discovered and the discovery process itself, but this approach has caused ambiguity and confusion. Recognizing this, the US Supreme Court approved rules about the discovery of electronic information in federal courts.

The new measures aim to make the process of electronic discovery clear, removing ambiguity and creating a uniform approach throughout the federal system. But already, the new system is causing unease amongst legal professionals and US businesses.

Huge Impact on US Business

While the rules have obvious implications for the litigation process, their impact on US businesses is huge. Designed to ensure that all relevant electronic information is quickly and easily accessible in the event of litigation, businesses are now faced with the intimidating task of storing and cataloguing every single piece of digital communication that could be used as evidence.

In anticipation of these new rules, a number of technology companies have been developing their products to help businesses. At j2 Global Communications, for example, eFax service has been enhanced by increasing the online storage period for customers' incoming faxes and messages up to two years, an increase of 100 percent. j2 Global Communications will also be introducing an index system to help customers catalogue, retrieve and store electronic faxes, enhancing customers ability to retrieve documents. Further, j2's technology transforms paper faxes into electronic documents allowing for companies to access and store documents in a controlled electronic environment thereby assisting companies in both the enforcement of document retention policies and decreasing the time and cost to collect relevant documents through electronic searches.

According to unspecified sources in eWeek, an online US publication, it was then Vice President, Al Gore, who sparked the need for the new rules. In March 2000, it was reported that Gore was unable to immediately produce emails relating to his fund raising activities when asked to by the Department of Justice. At the time, counsel Beth Nolan said that the White House emails were recorded on a series of 625 tapes and it would take six months to hunt for them.

Setting up the search equipment itself would take an additional two months.

Clearly, this kind of scenario was unacceptable to the courts. So, in an effort to ensure that all relevant electronic information is easily and quickly accessible, the new regulations were drafted.

Their impact, however, should not be underestimated. The rules demand that every single business in the US understands the way that it handles and stores all types

of electronic information so that each piece of electronic communication – from email, instant messages, electronic faxes, voicemails to text and graphical documents – and be in a position to provide adversaries early in the litigation process with precise information about the sources of relevant electronic information.

Concerns Regarding New Measures

However, there are concerns around the new rulings. Foremost among these concerns is their ambiguity, as they define electronic information very broadly as “any type of information that is stored electronically.” This terminology could force companies to store everything, dramatically increasing the money that they spend on storage and on systems to search and archive all this information.

Under the rules, it is crucial that lawyers from both parties select and agree on the electronic documentation that will be presented as evidence within the first 30 days of litigation. If lawyers provide incorrect information about a client’s procedures for storing and accessing electronic information to an opposing counsel or judge at one of the initial meetings, they could be sanctioned.

Lawyers are now much more accountable when it comes to understanding how data is stored. They will increasingly be relied upon as electronic data experts, and will be responsible for identifying which information is relevant to each case. Ignorance is no defense.

Even sophisticated companies can get it wrong. In the case of z4 Technologies against Microsoft Corporation, the judge found that an email revealed by a defense witness but not produced by Microsoft, was relevant to the trial. Having failed to produce the email in court, the judge determined that the defense had engaged in litigation misconduct and ordered Microsoft to pay additional damages of \$25 million, as well as around \$2 million in attorney’s fees to the plaintiff. It was also noted by the judge that he had the discretion to award triple the jury’s verdict because of litigation misconduct. That could have amounted to an additional \$345 million in damages for Microsoft.

New Rules Seem Overreaching

Understandably, the breadth of the new rules has unsurprisingly left many apprehensive. Failure to produce the right electronic information can result in heavy penalties and some judges have gone as far as to demand that all electronic data is produced for

discovery. The cost of producing this information is high, particularly as it involves sifting through and or restoring numerous back-up tapes. The burden to preserve these tapes is particularly high for large companies.

The rules recognize a safe harbor provision under which parties will not be penalized in most cases for failure to produce data that has been lost as a result of “routine, good faith” business operations. Documents deleted in the regular course of business are immune in litigation. However, while businesses do not have to keep everything, a further explanatory note says that litigants may be required to prevent potential evidence from being deleted.

The emergence of the new rules requires businesses to have full knowledge of the whereabouts of electronic data and must be able to provide it within a reasonable amount of time. Lawyers must understand their clients’ data storage systems and how their computer systems operate. They also need a firm understanding of the new technologies coming to market that businesses are using to communicate. Failure to grasp these technologies and their relevance to a case can result in severe penalties.

The impact of these rules in the US is that civil lawyers are going to have to understand technology, and quickly. Unless the syllabuses of law degrees catch up quickly, a lack of understanding in the profession could lead to some serious problems.

Marc Sobul, Director Corporate Marketing, j2 Global Communications, Inc.



www.efaxcorporate.com

Contact Us

Click above to contact sales for more information.



Publication of j2 Global Communications
6922 Hollywood Blvd.
Los Angeles CA 90028
866 761-8112
www.j2global.com