

Electronic Discovery

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Computers . . .

- 93% of the world's information is now generated and stored in digital form
- 3.4 trillion e-mail messages were sent in 1998, including 343 billion in the U.S
- The average office worker in the U.S. sends and receives an average of 60 e-mails a day

. . . and the law

- The number of law firms using computers for legal research increased from 5% in 1992 to 72% in 1995
- The number of attorneys who had computers at their desks rose from 7% in 1986 to 88% in 1995

Types of Computer Materials

- Client: databases, records, e-mail, reports, memos, software, hardware inspection
- Attorney: case management databases, memos, e-mails, software
- Experts: databases, memos, models, software

Issues

- E-mail: the new “smoking gun”
- Siemens Solar Indus. v. Argo
- “As it appears that (Argo’s solar technology) is a pipe dream, let Siemens have the pipe”
- Sexual Discrimination Case
- “Get rid of that tight-assed bitch”
- Deleted is not shredded until it is overwritten

Discovery

- What do you request?
- How do you request?
- Do you need an expert?
- Daubert issues

Inspection/Access

- Does the party producing discovery have to allow inspection?
- Who pays? Irony of “cost advantages”
- Who reviews?
- Privileges?

Privileges

- Attorney Client
- Work product
- Inadvertent disclosure
- How do you waive?

Federal Rules

- Rule 34—1970—’other data compilations from which information can be obtained”
- Rule 26—discovery can be limited if ‘unreasonably cumulative or duplicative, or it is obtained from some other source that is more convenient”
- Rule 26—discovery may be limited if “burden or expense outweighs likely benefit”

Texas Rules

- Rule 192.3—electronic recordings, data and data compilations
- Rule 196.4--
- Party must specifically request production and specify form
- Responding party must produce electronic or magnetic data that is responsive and is reasonably available in its ordinary course of business
- If cannot comply through reasonable efforts, object
- Extraordinary steps required to retrieve must be paid by requesting party if required to comply

Requesting Discovery

- Request for Production, Interrogatories
- Define “documents” in your request to include every type of material needed
- State it is a request under R. 196.4
- Specify form, e.g. request for disks, CD, inspection, printout
- Deposition?
- Preservation letter?

Specific Requests

- Which computers?
- Desktop, home, laptop, fileserver, palm pilot?
- Operating system?
- How is system backed up?
- How does email system work? Local machine, file server, Internet

Experts

- Experts to review system? Testify?
- Daubert issues-Kumho Tire
- Court appointed expert
- Joint expert

Inspection

- Early cases: Fennell v. First Step Design ; Strasser v. Yalamanchi
- Newer cases: Playboy v. Welles ; Simon Property Group v. mySimon, Inc.
- Procedure for inspection

Shifting costs

- Barbara Caulfield article, fn. 21
- Cases that have shifted or refused to compel
- Zonoras v. General Motors—proportionality test
- Anti-Monopoly v. Hasbro—pay for special programming
- Sattar v. Motorola—1/2 shift

Cases with no shift of costs

- *Bills v. Kennecott*—information should be available, defendant set up system
- *In re Brand Name Pres. Drugs Antitrust Litigation*—required responding party to pay for 30 million pages of email data stored on backup tapes

Privilege Issues

- Federal Work product: opinion v. ordinary or fact
- Texas Work product: core work product
- Database management systems—more than just facts?
- Attorney client privilege
- Waiver issues

Sanctions

- Permanent deletion of email-spoliation?
- Cabinetware v. Sullivan—deleted earlier version of source code
- American Bankers v. Caruth-death penalty sanctions for failing to produce information

Practical Guidelines

- Implement specific e-document retention policy, with litigation provisions
- Educate on e-mail
- Organize e-mail

