Legal E-Discovery Creates Opportunities, Challenges

It has been four years since electronically stored information was added to the U.S. Federal Rules of Civil Procedure (FRCP) as a category of discoverable material, and experts say electronic discovery, or e-discovery, has become more and more common in legal proceedings.

“E-discovery is one of the fastest growing segments of the legal industry today,” asserts Sally Kane, an attorney, editor, and writer for About.com Guide to Legal Careers.

Discovery is a process governed by the FRCP requiring the parties involved in a lawsuit to exchange certain information about the case before the trial begins. This allows both sides and the court to know in advance who will be testifying and what their testimony will describe.

“Discovery eliminates surprises at trial,” says John Shupper, chair and director of the Legal Studies department at South University — Columbia.

In 2006, amendments to the FRCP made electronically stored information such as emails, instant messages, voicemails, e-calendars, graphics, and data on handheld devices discoverable in litigation. Shupper says that when discovery requests are submitted today, parties expect to receive all relevant information, even if it was never printed on paper.

“Email and voicemail messages plus all printed note slips or logs containing a record of telephone calls or messages would be sought,” Shupper says. “Additionally, discovery requests can include access to a party’s computer server or hard drive to obtain relevant electronically stored data that is discoverable under the rules of court.”

Electronically stored information can be delivered to the requesting party in a variety of ways.

“The manner in which a party provides discoverable data can vary according to the amount of data that must be provided,” Shupper says. “Fairly small amounts may be sent as a PDF attachment to an email response or it may be downloaded to CDs or other portable storage devices, and by agreement, delivered by hand or by mail.”

In addition to becoming a common way to extract evidence in the past few years, Kane says e-discovery is also creating many new jobs in the legal industry. A wide range of people can be involved in e-discovery, including lawyers, forensic investigators, information technology (IT) managers, litigation support professionals and those who work in legal support functions.

“But litigants are now compelled to produce electronic data in addition to traditional paper documents, evidence in litigation may consist of millions of documents,” Kane says. “The cost of organizing this data so it was readily available from computerized data sources exceeded the legal fees in many cases. Seeking less expensive and more efficient ways to process large volumes of data, legal teams developed a multitude of litigation support functions to collect, organize, analyze, produce, and present evidence.”

The e-discovery process can be expensive, time-consuming, and complicated.

“It places additional burdens on the litigants to locate, collect, analyze and produce electronic information,” Kane says. “However, since litigants are casting a wider net for information, it is possible the law enforcement and other parties may ‘find the truth’ in the sense that they may obtain a clearer, more comprehensive picture of the facts and evidence.”

One newer form of electronic evidence that is becoming more and more useful to law enforcement is information posted on social media sites.

Eric Meyer, an attorney at Dilworth Paxson LLP, says online searches can yield a lot of incriminating information about litigants.

“One of the first things I do when I’m defending an employer and I get a copy of a complaint is to look at the caption,” Meyer says. “Then, I go online and I dig up whatever I can about the plaintiff-employee. It may be good ammunition later on.”
If an employee has Facebook privacy settings in place, can they still get in trouble for posting things? Even if a person has privacy settings in place for their social media accounts, Meyer says the information can still be used against them.

“Once the case gets going and we get into discovery, I’ll serve discovery requests on the other side asking for information that the plaintiff-employee may have published on Facebook or online,” Meyer says.

Meyer says the scope of what can be requested concerning what a litigant has published online is very broad.

Confessing something to a friend online is essentially the same thing as confessing to them in person, Meyer says.

Kane uses a worker’s compensation case as an example of how information posted on a social media site can be used against a person.

“Suppose an injured worker files a worker’s compensation claim alleging that he is unable to work due to a back injury,” Kane says. “If he posts on his Facebook site that he painted his house or lifted heavy equipment, that information could be used as evidence against him in his worker’s compensation case.”

Meyers advises people to use common sense when it comes to social media. “Don’t be stupid online,” Meyer says. “Teachers shouldn’t friend students or parents on Facebook. Be smart. Think about what you’re saying before you hit send.”

Shupper also advises people to keep social media posts clean, because the inappropriate comments or photos could come back to haunt them years later.

“People, particularly students who plan to enter the work force, need to realize that what they post on social media sites is public and permanent. Employers can be expected to check out these sites, particularly for people being considered for sensitive positions in government and industry.”