

ELECTRONIC DISCOVERY: DO IT RIGHT OR PAY THE PRICE

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I. INTRODUCTION

Electronic Discovery remains one of the more daunting and distracting, aspects of litigation life. How corporations and their counsel deal with electronic discovery prior to and during litigation can – and usually does – dramatically impact the course of the litigation and increase the costs of prosecuting, defending, and ultimately resolving claims. The Federal Rules of Civil Procedures Amendments from 2006 imposed a new set of burdens and created a new set of obligations that materially impacted the litigation landscape.

An estimated 93% of the world's data is created by computers.¹ In fact, roughly 97% of lawyers alone use e-mail on a daily basis.² And courts have consistently held that electronic evidence is as admissible as paper evidence. Simply stated, e-discovery has become a fact of litigation life. While the complexity and potential cost of electronic discovery can make the desire to avoid the matter all too understandable, it remains critical that both attorneys and their clients be prepared for e-discovery well in advance of litigation.

Most sophisticated entities and litigants have spent the last nine months addressing the vexing challenges faced by the new Federal Rules of Civil Procedures both in and out of the Courtroom. As Courts and litigants struggle to keep up with applying the new rules, new technologies in electronic communications threaten to overwhelm the newly-applied precepts.

Although a recent litigation survey found that issues related to e-discovery as the subjects of motions, hearing or rulings remained a rare or nonexistent event for 70% or more of the corporations surveyed, there has been a growing trend in the use of outside e-discovery vendors (37% in 2006 to 51% in 2007) and law firms with special technical expertise in e-discovery issues (26% in 2006 to 30% in 2007) and the retention of national or regional e-discovery counsel (17% in 2006 to 42% in 2007). Whether preparation is outpacing the litigation issues, or perhaps avoiding them, remains to seen.

So the question can be asked. What has been the effect of the amendments to the Federal Rules of Civil Procedures? What are the lessons to be learned from case law and circumstance? And how do we use those to protect the company's proprietary and other vital interests?

¹ Judd Robbins, *An Explanation of Computer Forensics*, <http://www.computerforensics.net/forensics.htm>

² Drew Fahey, *Electronic Discovery & Computer Forensics*, SANS Institute, January 22, 2004, www.giac.org/certified_professionals/practicals/gsec/3571.php, (citing 2002 American Bar Association Annual Technology Survey, *Litigation and Courtroom Technology*).