

## Who Knew What, When and What the Heck is EDD?

The number of attorneys, paralegals and litigation support personnel entering the business each year is eye opening. It is the intention of this article to go back to the basics and revisit EDD (Electronic Document Discovery) for its root value, the understanding and education of the neophyte. This article will discuss various aspects of handling, using and processing electronic discovery, including the uses and reliability of metadata. We'll leave the gathering of EDD and all of the intricacies and debate to the forensic folks.

Larry Johnson and Tom Howe, both attorneys with The Legal Technology Group, who speak regularly around the country, noted the following reasons they have found for attorneys not considering electronic discovery.

- Lawyers are notoriously late adopters of technology.
- The technology and terminology seem daunting, that they tend to be intimidated by "geek" jargon and the science involved.
- Clients are afraid there won't be enough safeguards against unauthorized persons gaining access to sensitive data that may not be relevant to the dispute at hand.
- Electronic discovery is perceived as being too expensive and burdensome.

Over the last century, with the exception of direct testimony, paper evidence has proved the most compelling form of evidence in trying criminal and civil cases. However, with the arrival of computers and information technology, the dependence on paper documents is changing. The real question is ... has the legal community kept pace with the phenomenal growth in computer technology ... and is it aware of the significance of computer generated data in the disclosure process?

According to the Gartner Group, a leading technology analyst firm, Coopers & Lybrand and other research firms...

- 80% of data created in the last 20 years exists in some electronic format.
- 97% of all documents created in 2000 were electronic.
- White-collar workers send/receive an average of 30 e-mails per day.
- E-mail is the dominant form of business communication today.
- 70% of documents created electronically are never printed to paper.

Keep that last number in mind as we continue and think about the implications of not getting key pieces of What is Electronic Disclosure? Electronic Disclosure is the review and production of evidentiary material for litigation stored in electronic format. What does it include? Electronic Disclosure includes, e-mail, word- processing documents, spreadsheets, databases, and presentations.

## Where can data be found?

Data can be stored or found on media such as:

- Floppy Diskettes
- Personal Organizers
- ZipDisks / JazDisks
- Palm Pilots
- CDs / DVDs
- Blackberrys (pager/e-mail)
- Backup Tapes
- Disaster Recovery Sites
- Employee PCs
- Cell Phones
- Network Shared Drives
- Legacy Data Sets from previous computing environments
- Deleted files
- Network Shared Drives

## Understanding the Computer Environment and Where to Look:

Consider these thoughts. Many of us spend more time in front of our monitors than we do with our family members. Many computer users keep everything they have ever created on their hard drives. Unlike paper, which at some point demands to be moved, filed, or thrown away, hard drives with gigabytes of space simply fill up invisibly. You may find what you are looking for in saved files that were not necessarily intended for others.

Depending on a company's backup policy, historical data can also be retrieved from backup tapes. Backup tapes provide a wealth of information, but can be very proprietary in nature and more difficult to work with. Pulling information from tapes often requires duplicating the exact operating environment in which the tapes were created. Once the data is removed, it often needs to be converted into a more meaningful or readable format.

As you can see, computer data is stored at multiple levels on a variety of media (as noted above). Many of these levels are not visible to the average computer user. Data may also be found in deleted files. When computer files are deleted, the data is not really deleted; the computer simply recognizes the space used by the file as "available" to be overwritten. The computer does not immediately write over this space with the next saved information. It is left intact until the computer decides that it needs all or a portion of the space. Understanding electronic evidence, where it is stored, and how to go about retrieving it is vital to the discovery process. With widespread use of computers, electronic evidence is everywhere. Not only do corporations store key documents on computers and servers, they also store activity logs and, of course, the ever popular e-mail. E-mail, for instance, can reside on both servers and a PC.

## **E-MAIL (Where the good stuff is):**

Most of us are familiar with the federal antitrust case against Microsoft where many of Bill Gates own e-mails were used to impeach him during cross-examination. This and other well-publicized cases where e-mail "made the case" give emphasis to the fact that litigators cannot afford to overlook e-mail.

Every day thousands of e-mail messages are created as part of a company's standard business operation. E-mail is growing exponentially and has become so commonplace that it is hard to imagine life before it or how we would live without it. Remember how frustrating it was only 4-5 years ago, when the copier or fax machine was down? Do you feel those same frustrations now when your e-mail is down?

You might be surprised to find that:

- 2/3 of the U.S. workforce uses e-mail as part of their daily routine.
- Workers spend from 1 to 2.5 hours per day handling e-mail.
- Over 330 million e-mail accounts exist in just the USA and it's growing daily.
- 2.2 billion messages are sent each day - compared with 293 million pieces of first class mail.
- 40 billion e-mails were sent in 1995.
- By 2005, the number of e-mails sent is expected to reach 35 billion per day.

The importance and complexity of e-mail has evolved from a few simple text messages to mission-critical documents, such as bids, proposals, contracts, negotiations and a host of other vital correspondence. E-mail can offer clues to how an organization has conducted its business - providing evidence of the company's decisions, behaviors, and activities.

What is it about e-mail that prompts people to be so bold and brazen in their communications? E-mail messages often contain very candid thoughts. For some unknown reason, people will speak very openly and often carelessly about what they think in an e-mail message.

Maybe it has to do with e-mail messages being informal and instantaneous, and people not having time to properly reflect upon what they are saying. Whatever the reason, you need to be aware that e-mail messages are more likely to contain blatant truths than their more carefully planned counterparts, letters and memos. People will write things in an e-mail that they would never say in a letter, memo or phone conversation.

## Getting more than you bargained for:

If your client is the producing party, be very careful to go through the material before turning the information over to the other side. Many IT personnel are so overloaded with support work they may take the easy road to fulfill a request and produce a whole backup tape containing messages and attachments. This is an important point to remember when receiving the opposing parties e-mails, where the receipt of additional material may help you or overwhelm you. Remember the days of getting papered?

Beware Viruses! Due to the prolific use of e-mail and the variety of places they come from, many attachments carry viruses. Having processed millions of e-mail and electronic records, we have found this to be more of a problem than you might think.

## How do you handle e-mails and electronic files when you receive them?

The traditional way has been to print the e-mails, print the attachments, bates label the first set and make one or more copies of that set. An alternative and potentially less expensive method is to convert the e-mails and attachments to images, number the images and review them electronically. In addition, converting the actual text of these documents provides a fully searchable database for assisting in your review.

Today's preferred way is to electronically review the files in native mode. Be sure you create and keep good relationships with your IT department, your litigation support department and knowledgeable vendors. Be sure to have a back up copy and beware of spoliation from mishandling. Also, don't forget about soft dates which change to the current date when opened or printed.

## Metadata:

When information is created electronically, the printable end product is what we are most familiar with. So, what is metadata? Traditionally, metadata is data about data. For example, a library catalog contains information (metadata) about publications (data), a file system maintains permissions (metadata) about files (data). Embedded in almost every electronic document is a telltale history of the document itself, such as the original author, document title, creation date, hidden notes, edits, changes and other traceable information.

Perhaps the fact that there are multiple versions of a single document can help you understand the evolution of the document and ultimately give you a better understanding of the events surrounding the litigation.

## How reliable is metadata?

The metadata to a large extent is dependent on the condition of the machine creating/editing the file in question. The software used to create a file generally collects Metadata. The information is taken from system tables (date, time, size, etc.) and answers to questions at installation or software registration. Rarely does the specific user enter data into the metadata fields (most of which has little to do with the files contents). There can also be metadata created by the author or typist describing the document.

Is the date on the machine the actual date? Was it corrected after creation, but before the last edit/print? Is the person using the machine the person who is logged onto the machine or someone just using it as theirs is otherwise tied up? Does the machine have a logon? Is the file a "restore to a earlier version" of the document that was printed? Metadata can certainly be a useful tool to help fill in the gaps in knowledge from a document collection, but, like all data, it may be the truth or just a collection of facts requiring further analysis to determine it's value, which may be no value at all.

## Electronic Collection Sizes:

So, you go back to the office today and find a CD or DVD full of electronic files. Someone will want to know how many pages you have and how long it will take to get it to paper or image.

A typical CD holds approximately 12,000 pages of images at 300 dpi, so can you use that as a gauge, right? No, only if they are images! Unlike TIFF images, there is no normal size to page ratio for electronic files. Word letters/memos can be greater than or less than 200 pages per megabyte. Excel spreadsheets can be greater than or less than 250 pages per megabyte. Plain text program source files can be greater than or less than 2,000 pages per megabyte. Bitmaps and other graphics can be greater than or less than 4 pages per megabyte. Binary or other non-ASCII data can be greater than or less than 100,000 pages per megabyte. Files that have color, imbedded charts, graphs, and pictures all increase file size, but may only be one page each.

So how many pages are there? Well - IT DEPENDS! It depends on a lot of factors. Some vendors, having completed conversions of many collections, will use that experience to give you numbers. One of the numbers that has been bandied about with a fair amount of reliability, as guess numbers go, is 75,000 pages per gigabyte. Someone was recently noted saying: We use an average of

It might help to suggest to the paralegal or attorney that they try not to be a technologist, but learn the buzzwords. Legal professionals need to focus on the important discovery issues; framing requests, finding inconsistencies, contesting requests, privacy issues, spoliation, relevancy rules, file preservation and case strategy.

Maintaining good relationships with legal assistants, IT staff, litigation support managers and staff, and outside vendors will improve your performance and help you prepare the case better, faster and less expensively. Vendors who have expertise in automation, e-mail and file extraction will find you shortcuts faster and offer technical steps better, if you tell them early on where you want to go. Be sure to meet with them first to determine what it is you are trying to accomplish and an agreed upon plan for moving forward.

### **In Summary:**

A by-product of our automated society is that many modern documents are not typed or handwritten. Instead, they are created using personal computers with a variety of processing applications or E-mail programs. Most professionals rely upon personal computers to maintain journals and to create their written communications; and most computer users have become prolific writers thanks to the convenience of computers. The result is that more documentary evidence exists today than ever before, yet it only exists in electronically stored formats, and is read on a computer screen.

*Open Door Solutions, LLP is a Dallas-based company providing litigation support services and document management solutions to law firms and corporations nationwide. Author Bob Sweat received his education in Business Administration and Economics at the University of Wisconsin and advanced work at Purdue University. He holds a Paralegal Certificate in Civil Litigation with Computer Emphasis from The Center for Legal Technology, Milwaukee, WI, and has years of experience working with local and national vendors on large, complex litigations. Bob is currently a partner at Open Door Solutions.*