

Chapter 1.11

Web 2.0 and E-Discovery

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ABSTRACT

Companies today face an overwhelming amount of digital information, and many of them are involved at some point in civil litigation. When a company is in the discovery (pretrial) phase of civil litigation, it usually exchanges information, including documents, with the opposing party in the litigation. The Federal Rules of Civil Procedure, which govern civil litigation in federal courts, were amended in 2006 to provide additional guidance to parties with regard to electronically stored information. The management teams of many U.S. corporations are working with their IT departments and lawyers in order to understand the sources of electronically stored information that may be potentially relevant to their litigation. Over the last 20 years, technology has grown increasingly more complex, from the early mainframe and personal computers to sophisticated e-mail and instant messaging applications that enable users to send and receive millions of messages every day. This chapter addresses the issues companies may face related to the discovery

of electronically stored information as a result of new communication technologies, including Web 2.0 applications.

INTRODUCTION

Companies today are dealing with new technologies and a growing amount of digital information. Each year, the global information growth is larger than any previous year, and that trend is not showing any signs of slowing down. In 2002, an estimated 5 exabytes of digital information were created worldwide. For reference, 5 exabytes is the equivalent of 37,000 libraries the size of the Library of Congress (University of California at Berkley, 2003). The annual growth is roughly doubling each year, and U.S. corporations are contributing to this trend. Electronic communication technologies, including e-mail as well as next-generation Web 2.0 social technologies (e.g., instant messaging [IM], blogs, and wikis), are also contributing to this rapid growth. For example, Cellular-News reported that Gartner predicts that an estimated 1.9 trillion instant messages were sent worldwide in 2007 ("SMSs to Surpass 2 Trillion

DOI: 10.4018/978-1-60566-122-3.ch006

Messages in Major Markets in 2008,” 2007). These new technologies are transforming modern organizations and their employees. Corporate technology managers are assessing the potential benefits of these new technologies relative to the burden and risk they present to the organization, including that from litigation.

This chapter is not intended to be a comprehensive review of the phases of civil litigation or the Federal Rules of Civil Procedure (FRCP). In addition, the author of this chapter is not a lawyer and the information in this chapter is generalized and not intended for specific situations, and should not be substituted for the advice of a lawyer. The following is an overview of the business issues related to managing electronically stored information that may be required in litigation. By way of background, many companies will face civil litigation, which is when one individual or organization sues another seeking relief, oftentimes for money damages.

E-DISCOVERY BACKGROUND

The *United States v. Microsoft* case, which was tried in 1998, is a famous civil case in which the United States Department of Justice (DOJ) filed an antitrust claim against the software giant alleging it used its monopoly power of the Windows operating system to bundle its Internet Explorer Web browser. The government claimed that other Web browsers, such as Netscape, were not able to compete in the Web browser market due to Microsoft’s positioning of Internet Explorer within the Windows operating system. The DOJ won in the trial court, but an appeals court overturned the decision and the case later settled. The Microsoft case was full of headlines and was an example of a case where e-mail played a critical role. The DOJ trial lawyers used internal Microsoft e-mails, many authored by senior executives, including Bill Gates, to demonstrate the company’s alleged strategy to “cut off Netscape’s air supply” (United

States Department of Justice, 1999).

Civil litigation follows specific procedures. Cases in United States federal courts follow the Federal Rules of Civil Procedure. The Federal Rules define the rules into different categories, including Commencement of Action, Pleadings and Motions, Parties, Deposition and Discovery, Trial, and Judgment. The remainder of this chapter will focus on the discovery phase of civil litigation. During the discovery phase of a case, thousands or even millions of documents may be collected, reviewed, and produced from the files of either party in the lawsuit.

Let us use a hypothetical example to illustrate the process. The Acme Corporation, a fictional product manufacturer, is involved in civil litigation. The case involves a former employee, John Doe. John filed a lawsuit against Acme alleging he was terminated as a result of age discrimination. John Doe, who is the plaintiff, hired a lawyer to represent him in his suit against Acme, the defendant. Acme also hired a law firm to represent it in the case. When the case reached the discovery phase, John’s lawyer asked Acme for documents that related to John’s termination. Acme’s management, working with its lawyers, determined which employees had documents that related to his termination. It instructed specific employees to not discard the documents that related to the issues in the case. Acme’s IT director worked with his management to determine the locations where electronic documents that related to the case were stored.

Now, let us walk through three variations of the Acme example at different points in time. In the first variation, Acme terminated John in 1990. In 1990, most companies did not have company-wide e-mail accounts or network servers. Wireless cellular telephones were just getting started and smart phones were still a science fiction concept. The computer systems at Acme, including those used by John and his management, were probably running MS-DOS or Windows 2.0 (the classic 286 PC). If Acme was on the cutting edge of

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