Peeking Behind the Curtain of Electronic Data – Avoiding the OUCH!

Current Trends in Electronic Discovery and Corporate Risk Management

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Electronic evidence is fast becoming a central focus of discovery in litigation in U.S. courts, and this development presents enormous problems — or opportunities — for attorneys. Moreover, with changing discovery rules, rapid accumulation of electronic data, the growing and uncontrolled use of electronic mail and the increased use of sophisticated backup and archive systems, this trend is likely to intensify in the coming years.

Indeed, we are in the midst of a dramatic change in the discovery process, and those attorneys who are prepared to meet this challenge will find ways to turn this transition to their advantage. Those who ignore it do so at the risk of expensive, embarrassing and unproductive litigation experiences — not to mention the distinct possibility of devastating verdicts.

The Door Opens to Electronic Data Discovery

Only a few years ago, the majority of corporate data was stored and processed on large, expensive mainframe computers. The cost of obtaining processing time and expertise to deal with data from such a system was prohibitive in most litigation — or at least that was the perception. As a result of this and other factors discussed below, paper documents remained the preferred source of discovery by plaintiff’s lawyers, who could rely on persistence, dedication and quick wits to cull useful information from mountains of paper.

This situation has changed dramatically in recent years. The power of the personal computer has substantially increased, causing many corporations to downsize their mainframe operations onto networks of personal computers. Additionally, many stand-alone and networked microcomputers within corporations now perform varied and important electronic data processing operations. Smaller companies that could not afford large mainframe systems are now able to install widespread, sophisticated computing platforms.

Correspondingly, plaintiff’s lawyers are beginning to realize that they, or specialized computer consultants, now have the power to process types and quantities of electronic data that were formerly
unapproachable. The intimidating prospect of learning about, and gathering information from, a complex mainframe computer is greatly reduced today, as much corporate data processing is done on computers that are virtually identical to those used in the lawyer’s office. Once their foot is in the door, plaintiff’s counsel often finds that using electronic data for discovery purposes is faster, cheaper and more thorough than any type of discovery previously used.

Recognition is growing among both the Bar and clients that lawyers who handle discovery the old fashioned way — ignoring electronic mail and other electronic data sets — are missing evidence that could be critical in the litigation. An old case about wireless radio sets from 1932 (T.J. Hooper, 60 F 2d 737 Second Circuit 1932) may as well have been about electronic discovery when it reached the conclusion that new technology that provides an advantage should be implemented. As one recent article put it, “when an emerging technology provides a unique protection against unpredictable dangers, at a reasonable cost, the enterprise risks liability for lagging in its adoption.”

One might make an analogy to the early, post-World War II period when radar became widely available as a civilian navigation tool. There were some fine, experienced ship captains who had learned to navigate without any electronic aids and who stuck to their tried-and-true ways rather than trusting their fate to a “new” technology. This lasted until the courts began to impose liability on ships that did not use radar when it was determined that the collision or accident could have been avoided by using the new technology.

Litigation lawyers who do not attend to electronic evidence — in an age when electronic mail and other kinds of electronic data are often the sole source of critical evidence — are soon going to be in the same boat (so to speak) as those captains of old. A transformation of the discovery process has begun, and it promises to be a disaster for those attorneys who are not prepared. Any corporation that does not prepare proper response mechanisms in advance of litigation will be at a strategic disadvantage and may not be able to respond in accordance with prescribed rules of discovery.

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1 In this case, a tug petitioned for limitation of liability against damages for loss of cargo in a 1929 storm off the Delaware coast. Although sufficient storm warnings had been broadcast, the T J Hooper was not yet equipped with adequate radio equipment to receive this information. In finding the tug unseaworthy, Judge Learned Hand speaks across the decades with the following observations:

"An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to tows ... They can have at hand protection against dangers of which they can learn in no other way; a whole calling may have unduly lagged in the adoption of new and available devices. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack ."

2 Fougner, Bob, The Maritime Advocate
Electronic Data Gets Its Day In Court

The courts also have begun to recognize that the discovery of electronic data means more than obtaining a printout of computer files. As an example of the increased attention being given to electronic evidence, review the following excerpt from a federal court decision, holding that electronic copies of electronic mail in the IBM PROFS electronic mail system are not the same as paper printouts:

First, these systems give recipients [of electronic mail] the option of storing notes in their personal electronic “log.” After receiving a message, a user may instruct the computer to delete the note; otherwise, it will be stored in her log for later use. Second, both the recipient and the author of a note can print out a “hard copy” of the electronic message containing essentially all the information displayed on the computer screen. That paper rendering will not, however, necessarily include all the information held in the computer memory as part of the electronic document. Directories, distribution lists, acknowledgments of receipts and similar materials do not appear on the computer screen — and thus are not reproduced when users print out the information that appears on the screen. Without this “non-screen” information, a later reader may not be able to glean from the hard copy such basic facts as who sent or received a particular message or when it was received. For example, if a note is sent to individuals on a distribution list already in the computer, the hard copy may well include only a generic reference to the distribution list (e.g., “List A”), not the names of the individuals on the list who received the document. Consequently, if only the hard copy is preserved in such situations, essential transmittal information relevant to a fuller understanding of the context and import of an electronic communication will simply vanish. A final relevant fact here is that the individual note logs are not the only electronic repositories for information on the E-mail system. The [system operators] periodically create backup tapes -- snapshots of all the material stored on these electronic communications systems at a given time -- that can be used later for retrieval purposes.

[Armstrong v. Executive Office of the President, 1 F.3rd 1274, 1280 (D.C. Cir. 1993)]

Not only is all of this additional information available in electronic form and not on paper, but the information is more useful in electronic form because it is easier to search, review, annotate and produce. Courts have therefore required parties to litigation to turn over electronic copies of their information, in some cases even where the information has already been turned over in paper and where some additional computer processing work is needed to generate the electronic file. See, e.g., National Union Electric Corp. v. Matsushita Electric Industrial Co., 494 F.Supp. 1257 (E.D. Pa. 1980).

Practical Knowledge of Electronic Discovery is Critical

As electronic data increasingly becomes the focus of discovery efforts, it becomes increasingly important for practitioners to understand the role of electronic data in the discovery process, the aspects of electronic data that make it a unique information source, and the various processes and procedures that are involved in the actual discovery and use of electronic data.
Some of the points that make electronic discovery so important today include:

- **Electronic discovery is being used more and more**
  Over the past decade — and especially in the past few years — the use of electronic data in discovery in litigation, regulatory actions and law enforcement investigations has increased tremendously — and it’s increasing daily.

- **Plaintiffs are starting to focus exclusively on electronic data**
  As plaintiffs’ lawyers realize that electronic data is cheaper, faster, easier and more content-rich than paper or other forms of discovery, they are increasingly turning to electronic discovery as their primary source of information. In a large, current litigation, a well-known plaintiffs’ firm has issued the following statement regarding discovery:

  “Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even where a paper copy exists, we will seek all documents in their electronic form along with information about those documents contained on the media. We will also seek paper printouts of only those documents which contain unique information after they were printed out … along with any paper documents for which no corresponding electronic files exist.”

- **Plaintiffs are using an organization’s own lack of preparedness against it**
  Another well-known plaintiff firm active in the class-action arena recently filed a motion to compel a number of defendant corporations to “suspend all routine destruction of documents, including but not limited to, recycling back-up tapes, automated deletion of e-mail, and reformatting hard drives…”

  They argued that, “In general, companies do a poor job of preserving information related to litigation. The most common reason for this is not any improper or unethical practice, but because of poor procedures and practices. This is most true for electronic information. As much of the relevant information in [redacted] litigation exists in electronic format, this creates a problem that requires special handling to resolve.”

  This firm’s idea of “special handling” in this case was an ex parte order compelling the preservation of “all documents and information, whether it is paper or electronic format…” including the preservation of all existing backup tapes and the requirement that new backups be made and preserved on a daily basis. The Judge signed the order.

- **In today’s post-Enron/Andersen era, the costs associated with not being prepared can be ridiculous**
  News reports that a particular company had allegedly destroyed documents sent its share price down more than 25% that same day. Given its market cap, this represented a loss of over 466 million dollars.

  When asked about leaks to the press, one of the plaintiff attorneys denied that he had leaked the information to the press, stating that all he had done was “respond to press inquiries that have come to me…” (Reuters Business Report, Friday May 10, 2002)

- **Electronic discovery will happen**
  It is no longer a question of whether or not your client’s data is going to be pursued: It will be. Rather, it is simply a matter of when it will happen, how much it will cost, and how great an
impact it will have to respond to these requests in a timely and defensible manner

- **Requests and Orders for electronic data are having an increasingly profound impact on discovery**
  - Company sanctioned for failing to include electronic data in production even though it had not been specifically requested
  - Company sanctioned because backup tapes and other data showed up after the discovery cutoff date
  - Company ordered to review thousands of desktop computers because of the way in which they chose to store their data
  - Company ordered to turn over all of their electronic mail files because they could not defensibly search and produce their own mail

- **Law firms and regulatory agencies are investing time and money developing in-house legal and technical electronic discovery capabilities**

  As legal practitioners realize the value and necessity of electronic discovery, they are investing resources to develop their ability to deal with electronic data in both a theoretical and a practical manner.

- **Professional Organizations like NELA and ATLA are increasingly offering seminars and training workshops to their members on such topics as 30(b)(6) depositions and other electronic discovery techniques**

  *NELA – National Employment Lawyers Association (http://www.nela.org)*
  - Computer Technology For The Plaintiff Employment Lawyer
  - Discovery In The Age Of Computers, Voice Mail and E-Mail
  - Critical Issues In Investigation & Discovery Of Employment Cases: Witnesses, Documents, Computers

- **Users of computer systems continue to put things into electronic mail and other electronic files that create huge problems — or opportunities — for litigators**

  Users of systems like electronic mail get very little training on how to use these systems, let alone training on what *not* to do. In a situation where Users believe they have a privacy right and that delete means delete, it is little wonder that computer Users frequently use their electronic mail to gossip, speculate and say things that they would never put in “writing”

- **Decision-makers are becoming more educated about electronic discovery issues as Judicial education and training programs become more frequent and industry standards begin to develop**

  You must never find yourself in a situation where the decision-maker — Judge, Mediator, Special Master — know more about electronic discovery than you do

- **Various software and hardware tools are being developed that make electronic discovery more cost-effective, that effectively deal with scope and volume issues, and that make the process defensible in terms of “properness,” thereby making requests for electronic data “reasonable”**
You must constantly be aware of new tools, processes and services that develop to deal with electronic discovery so you can make appropriate assessments of what a client may or may not be able to do with its electronic data set.

- **Because your clients are being increasingly affected from both a financial standpoint and a business interruption standpoint**

Your clients will increasingly be looking to you for counsel in the area of electronic discovery — how should they identify, locate, retrieve, review, preserve and produce their electronic data in ways that are economic, timely and defensible.

**TECHNOLOGY AND THE PRACTICE OF REAL ESTATE LAW: Counseling your clients about the discovery risks associated with new technology**

As with most industries, the practice of real estate is being revolutionized by new technology. The creation, use, storage and retention of data is being radically modified as new hardware, software and communication tools are developed and introduced into use.

Attorneys who deal with the practice of real estate law, and in corollary areas such as construction and property management, must be aware of these new and changing technologies, the types and quantities of data being captured and the potential role of these new technologies and/or data sets in the discovery arena. Failure to do so will result in undue client risk and in the possibility of missing important information.

Some of the ways in which new technology is being employed include:

- **WEBSITE PROLIFERATION**

Real Estate firms, Developers, individual agents and others are increasingly turning to the Internet as a means of advertising and communication with their clients. These sites are often set up by outsource hosting companies or in-house technologists who give little thought to content accuracy or ongoing management.

Some of the legal and/or discovery issues that may arise over the use of websites include:

- **Content Accuracy**
  
  Disputes over whether the information contained on the website is accurate.

- **Content Objectivity**
  
  Disputes over whether the information contained on the website is biased.

- **Timeliness of Content**
  
  Disputes over whether listings and/or other information was posted to the website in a timely manner.

- **Content Quality**
  
  Disputes over whether the information contained on the website is of a quality that properly represents the property (i.e. low resolution pictures).

- **Hosting Quality**
Disputes over whether the hosting service and or bandwidth provider has provided adequate (or contractually obligated) levels of service, including access speed, access windows and uptime levels.

- **Site/Prospect Ownership**
  Disputes over the ownership of the website itself or the leads/prospects generated by the website.

- **Copyright Ownership**
  Disputes over the ownership of the content on the website.

**“AMATEUR ADVICE” PROLIFERATION**

The Internet allows individuals to quickly find information on almost any topic. Unfortunately, there is no way to either ensure that this information is accurate or that it will be provided in the proper context.

As more and more information becomes available online, individuals may be tempted to provide that information to clients, prospects or other professionals in the form of value-added “advice,” even though it is outside their particular area of expertise.

Examples of this have included improper advice on zoning and land-use issues, funding rates and opportunities, and comparable properties.

**USE OF AUTOMATED SYSTEMS**

Automation can provide increased productivity and automated systems such as prospect; client and transaction tracking are increasingly being used both by companies and by individuals.

The legal and/or discovery issues that may arise over the use of automated systems include:

- **Data Accuracy**
  Issues over whether the information contained within the systems is accurate and whose liability it is for actions/decisions that may be based on incorrect information.

- **Data Ownership**
  Disputes over ownership rights to the information within the system.

- **Data Maintenance**
  Disputes over whose responsibility it is to update and/or otherwise maintain the information within the system and whose liability it is for actions/decisions that may be based on outdated information.

- **Constructive Notice**
  Disputes over when notice is actually given based on data entry into the system.

- **Privacy**
  Privacy issues may arise over the data contained within a given system and the impact that the disclosure of private information may have on a given transaction.

- **Record Retention**
  Disputes over whose responsibility it is to enact record retention and over the length of, and data format for, retention.
AUTOMATED COMMISSION TRACKING SYSTEMS

Commission tracking and automated accounting systems are an increasingly popular area of automation.

Some of the legal and/or discovery issues that may arise over the use of automated commission tracking and accounting systems may include:

• **Data Accuracy**
  Issues over whether the information contained within the systems is accurate.

• **Formula Calculations for Commission Calculations and Commission Splitting**
  Disputes over the accuracy of formulas used to calculate commissions and the splitting of commissions between agents and brokers.

• **Timing of Payments**
  Disputes over the timing of payments based upon the accounting procedures used for tracking cash flows.

• **Disclosure and/or Access to Data**
  Disputes over who has what rights to access and/or audit accounting and other financial systems.

• **Record Retention**
  Disputes over whose responsibility it is to enact record retention, and over the length of, and data format for, retention.

WIRELESS AND INSTANT COMMUNICATIONS SYSTEMS

Cell phones and pagers are now standard in the Real Estate arena. Other wireless technologies, such as networking, are quickly becoming available with bundled real-estate applications.

As these technologies become more integrated, some of the legal and/or discovery issues that may arise include:

• **Constructive Notice**
  Is a page or an email proper notice?

• **Acceptance / Position**
  If someone sends an offer from a laptop to an agent’s pager just before another prospect submits a paper offer, who is first in line? Is receipt of an email “acceptance”?

• **Connectivity Guarantees**
  If a wireless service is offered for communication and/or information distribution, issues may arise over service level issues from the service provider.

• **Data Security and Privacy**
  Disputes may arise over the privacy and security of data being transmitted.

• **Data Authenticity**
  Disputes may arise over the accuracy and authenticity of electronic records and transmissions.
WIRING, BANDWIDTH AND CONNECTIVITY

In today’s highly connected environment, wireless communication and connectivity to the Internet and other sites is becoming mission-critical for businesses and individuals. Representations made about wiring, connectivity and bandwidth are increasingly being relied upon for buy-decisions and valuation purposes.

The following may be sources of liability:

• Types of Wiring
  CAT-5 or optical? STAR or LOOP? The types of wire used and the type of wiring configuration can have huge impacts on the ability of a buyer or tenant to maximize its technology infrastructure. It is becoming increasingly important for real-estate professionals to understand the terminology and technology of wiring systems.

• Bandwidth Availability and Uptime
  The need to connect to the Internet and remote offices over high-speed access lines is of critical importance to businesses today. Misrepresentations regarding bandwidth availability, uptime and speed can have huge downstream impacts on business productivity.

• POP Locations
  The location of POPs, or Points-of-Presence, to bandwidth can have ramifications on bandwidth access and on the valuation of business properties.

• Power
  It takes a lot of power to run today’s computing infrastructures. Representations about existing power availability within a property and/or representations made about additional power drops can have large valuation impacts.

• Vendor Choice
  Many property owners and/or developers are making deals with bandwidth and/or access vendors to be sole-providers for properties. If these vendors are not viable, buyers and/or tenants can suffer large economic losses very quickly.

WEBCAMS AND OTHER NEW TECHNOLOGIES

As new technologies are introduced into areas such as construction, new requirements for data management arise.

For example, the use of real-time, web-based cameras, or WebCams, can raise liability issues related to:

• Consistency
  If WebCams are used for progress monitoring or security, it is important that a consistent and unbiased record be created.

• Record Retention
  Disputes over whose responsibility it is to enact record retention, and over the length of, and data format for, retention.
The use of electronic mail is booming and, in many cases, is the dominant form of communication for a given transaction. The ability to manage email communications and to develop and implement systems for retaining electronic mail, as appropriate, is becoming important for real estate and other transactional arenas.

Parties to emails today may include:

- **Brokers and Agents**
- **Buyers and Sellers**
- **Appraisers and Loan Officers**
- **Title Company Officers**
- **Architects and Builders**
- **Attorneys and Accountants**
- **Land Surveyors**
- **Building Inspectors**

If disputes arise over the facts and/or timing of a given transaction, electronic mail may provide the best record of what actually took place.
ELECTRONIC DATA IS DIFFERENT:
Why You Must Be Aware of and Concerned About the Details

Electronic data files contain far more information than a paper or paper-like image file can ever contain. Electronic data files contain “meta-data” such as dates, times, routing information, login names and even user-entered information that was thought to have been “deleted.”

If potential relevance decisions are made using paper, TIF, PDF or other images of paper — all of which are incomplete data sets — then the decision-making process is fundamentally flawed as it did not take into account all available data.

It is important to understand that just because “meta-data” and other systemic information may be
available for a given set of electronic data does not necessarily mean that it will be particularly important or relevant to any given matter. It cannot, however, be ignored or improperly used. If it is, the act of ignoring or improper use may itself become the focus of dispute and you may face sanctions and/or be forced to re-do discovery.

To establish defense-of-process for your discovery efforts, however, potential relevance decisions about electronic documents — and the review of these electronic documents — must be made using all available information. This means keeping the documents in electronic form and using case-appropriate metadata during potential relevance decision-making and document review.

The good news for both the legal practitioner and the client in all of this is that the tasks of identifying, locating, retrieving, analyzing for relevancy, reviewing, preserving and producing electronic data under an electronic discovery model that is both proper and defensible is faster, easier and cheaper than trying to apply traditional, paper-based models to electronic data sets.

It is incumbent upon today’s legal practitioner to understand the basis for these differences and the technology that is available to conduct electronic discovery in a proper, timely, economic and defensible manner.

**Discovery Cost Comparison: Traditional vs. Electronic**

**Traditional Discovery Model**
- 10,000,000 eMails searched and 15% hits found = 1,500,000 potentially relevant eMails
- 1,500,000 eMails averaging three pages each = 4,500,000 physical pages
- 4,500,000 pages TIFF’d and OCR’d at $0.32 per page = $1,440,000
- 1,500,000 eMails with an average attachment rate of 15% = 225,000 attachments
- 225,000 attachments at ten pages each = 2,250,000 pages
- 2,250,000 pages TIFF’d and OCR’d at $0.32 per page = $720,000
- 6,750,000 TIFF/OCR images loaded into a review platform = $337,500
- \(6,750,000 \text{ images at } 0.05 \text{ each to load} + 10 \text{ software review licenses at } 3,000 \text{ each}\)
- $2,497,500 in cost to prepare for review (without Pre-Annotation or De-Duplication)

**Electronic Discovery Model**
- 10,000,000 eMails searched and 15% hits found = 1,500,000 potentially relevant eMails
- 1,500,000 eMails handled electronically = ZERO “Pages”
- 1,500,000 eMails loaded into DiscoveryPartnerOnline at $0.12 each = $180,000
- 225,000 attachments handled electronically = ZERO “Pages”
- 225,000 attachments loaded into DiscoveryPartnerOnline at $0.12 each = 27,000
- $207,000 in cost to prepare for review (with Pre-Annotation and De-Duplication)

**LESSONS LEARNED:**
Minimizing Potential Problems Associated With Electronic Discovery
Current Trends in Electronic Discovery and Corporate Risk Management

- **You Must Act Quickly and with Determination**
  
  Preservation is emerging as one of the key electronic discovery issues. New matters must be assessed quickly to determine the possible role of electronic data and then steps taken to reduce risk. During normal use, backup tapes are rotated, data on databases rolls off, and Users may inadvertently delete documents, all of which can be seen as destruction.

- **Determine the Strategic Role of Electronic Data and Develop a Comprehensive Operational Plan**
  
  - Determine appropriate preservation steps for both Legacy and Ongoing data
  - Determine appropriate focus in order to maximize resources
  - Consider the role of Opponent and Third-Party data sets
  - Determine the right timeline for pursuing data and for preparing client data
  - Assign roles to various players — Firm, Client, Expert

- **Develop and Follow an Electronic Discovery Model**
  
  Long before you have to actually deal with an electronic discovery issue you should develop a model that you will use to guide you through the process. The model should be detailed, complete and be defensible in each of its components. The use of such a model will allow proper decisions to be made in the correct order even when the rush of discovery is clouding other issues.

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**Electronic Discovery Process / Role of Expert**

- **Data Assessment & Collection**
  - Define Information Needs and Gather Client Data, Process and Infrastructure Information
  - Assess Client Information and Develop a Focused Strategic Electronic Discovery Plan
  - Collect Data from Appropriate Systems, Applications and Stored Data Sets
  - Analyze Collected Data to Allow Focus on Proper Materials

- **Preservation**
  - Preserve Appropriate Legacy Data and Implement Ongoing Preservation

- **Processing**
  - Develop & Validate De-Duplication Algorithms and Search Criteria Sets
  - De-Duplicate, Search, Annotate and Load Appropriate Data

- **Review**
  - Develop Defensible Review Strategy and Conduct Online Review of Data

- **Production**
  - As Necessary, Produce Selected Data in Appropriate Format(s)

- **Defense of Process**
  - As Necessary, Introduce Defense-of-Process and Other Testimony

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Leading the World in Digital Discovery™
- **ELECTRONIC DOCUMENTS ARE NOT LIKE “TRADITIONAL” PAPER AND THEY ARE NOT LIKE “ELECTRONIC PAPER”**

Electronic data files have unique characteristics that make them different from paper documents or paper-equivalent image files like TIF and PDF — they must be identified, located, retrieved, reviewed, preserved and produced in a format-appropriate manner that is timely, cost-effective and defensible under detailed examination. Beware of formats that only contain visual user content and that increase costs.

- **Don’t Wait — Electronic Data Has Characteristics That Will Add Processing Time And Uncertainty**

Electronic data files have unique characteristics that need to be considered and dealt with before automated processing can take place. Therefore, electronic data discovery issues should be considered early on in the litigation.

Some of these potential issues include:
- Pre-Processing / Indexing Requirements
- Many Data Types
- Compression and/or Encryption
- Many Media Types
- Infrastructure issues involving client

- **Companies have a lot of Electronic Data**

Corporate computer users — and corporate computer systems themselves — create lots of electronic data. Up to half — and some say more — of all electronic data created today never gets printed to paper or put on any other physical media — it only exists electronically within the computer system. When backups and other archives of these data sets are factored in, tremendous volumes can be the result.

- **You Cannot Avoid the Law of Small Numbers**

Even the most efficient manual approach for handling electronic data quickly succumbs to the “Law of Small Numbers,” which says that very small numbers (such as the time it takes to process or review a given data item), when multiplied by very large numbers (such as the total volume of data extant), become large numbers themselves. When large data sets are under review, inefficient review systems result in virtually every action having a material impact on both time and cost.

It is critical that appropriate and defensible tools and processes be applied to limit data sets and to efficiently process those data sets that need to be dealt with.

- **Handling Electronic Evidence Properly is Hard**

You cannot handle electronic documents casually and still preserve their evidentiary nature — many factors and variables must be controlled in an appropriate manner. Maintaining the integrity and defensibility of a data set that may number in the hundreds of millions takes experience and knowledge and the proper use of tools, protocols and processes.
It is Impossible to Anticipate all of the Actions of the Adverse Party or the Thinking of the Decision-Maker

It is very difficult, if not impossible, to anticipate all the steps that your opponent may make or the types of decisions that a Judge or Arbitrator may make. Strategy, experience, knowledge and awareness all play a role in what others may do. This means that you must be prepared to respond in many different ways at a moment’s notice.

Before Litigation Strikes — The Benefits of Proactive Risk Reduction

With litigators and regulatory and law enforcement agencies all aggressively pursuing your client’s electronic data, what can you do to reduce their risk? You must prepare for electronic discovery by:

- Understanding the technology and the terminology of your client’s electronic data sets
- Profile your client’s litigation information needs ahead of time and map them to their electronic data sets and systems
- Identify their specific electronic data risk areas
- Develop and implement risk-reduction systems and litigation response programs

The key electronic risk areas that your client will face will be from:

- The (mis)use and retention of electronic mail
- The creation and retention of backup tapes
- Uncontrolled/unaccounted for distributed data
- An outdated records management program
- The lack of a defined litigation response plan that addresses, among other things, preservation and defense-of-process

The Rule of Law means deciding disputes by applying law to the facts of the case. In today’s environment, computers are often the best — and, increasingly, the only — source of evidence.

Unfortunately, legal and computer processes were never designed to work together. The challenge for the future that we face as legal professionals is to develop methodologies for protecting clients by dealing with electronic discovery in ways that are defensible, timely and cost-effective.
About the Author

John H. Jessen (jjessen@eedinc.com) is the Founder and CEO of Electronic Evidence Discovery Incorporated. Recognized internationally as the pioneer in the field of electronic evidence discovery, Mr. Jessen is a frequent author of articles on the subject and has presented numerous lectures and seminars nationally on legal and electronic data issues. Mr. Jessen has over sixteen years of experience in the computer industry and is currently profiled in Who's Who in the Computer Industry, Who's Who Worldwide, Who's Who in the West, Who's Who in Finance and Industry and Who's Who of American Business Leaders.

Profiled in the Wall Street Journal and called the “Best of the breed” by the ABA Journal and “The nation’s foremost authority on sniffing out secret or deleted computer files” by Entrepreneur Magazine, Mr. Jessen and his firm assist attorneys in utilizing electronic data in litigation and organizations in developing electronic data retention and management policies.