

Electronic Data Discovery Tips for Paralegals



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eDiscovery Tips for Paralegals

Technology and the Internet are a daily part of life for a majority of people, with all of them utilizing the electronic communications capabilities that come with. A direct result of technology has created yet another area to gather information from for court cases of all types, as well as creating seemingly enormous amounts of information. It is the job of paralegals to gather this information, compile everything in a logical order and have it presentable for the attorneys to use in their cases. The seemingly ephemeral nature of electronic communications makes getting all of this together a seemingly daunting task, when it is anything but. Following are eDiscovery tips for paralegals that help make sense of the gathering and organization of electronic communications.



Learn These Rules of the Federal Rules of Civil Procedure

Thoroughly read Rules 16, 26, 33, 34, 37, 45 and Form 35. Certain jobs, such as talking to clients, trickle down to paralegals. This means being prepared to ask the right questions is paramount. Each of these rules

has language that is specific to eDiscovery issues; all of them provide a structure to follow to ensure that data recovered is admissible in court as well as covering contingencies such as an inadvertent hard drive overwrite.

Arguably, the most important rule is Rule 34. This rule falls under Title V, Disclosures and Discovery. Within is necessary information of how electronic data is defined. It also clarifies that data that has been created electronically does not have to be produced on paper. In essence, if a company stores all of its data on hard drives, submitting that hard drive is acceptable under the rules.

Form 35 lays out a plan for discovery and covers all of the contingencies that might arise at a meeting for turning over data. The form streamlines the information that is gathered at a discovery meeting, creating a framework for further actions. This is disseminated to all involved parties, so familiarity with the form is essential.

Another reason for becoming familiar with the rules is to avoid mistakes. It is up to the lawyers to follow correctly the procedures outlined in the rule, but a diligent paralegal ensures that the work she is putting together has been obtained correctly. It is better to catch a mistake early on, long before the matter goes to court, keeping the case from being compromised due to a technicality.

Always Follow the Chain of Custody

The chain of custody for electronic media must be followed to the letter. Some forms of storage are easily alterable by someone with a modicum of knowledge. Letting the chain of custody lapse for media is potentially harmful. Create a log that covers who has the evidence, where and when the evidence was received, and what is on the hard drive. Also record any and all characteristics of the drive, down to the size and serial numbers on the housing.

Many times, the storage medium is sent out of house to a forensic specialist in order to uncover the evidence that is stored on it. The specialist is working for the firm and the client, and does not alter or change any of the data that is on the media. His job is to uncover or recover information that can be used in court. Always make sure that the specialist has signed off on the chain of custody. This serves the dual purpose of ensuring that no lapses are made that can be challenged later and letting those in-house know that the media is currently being examined elsewhere and not physically present.

Make Copies and Backups of all Media

This is one of the essential eDiscovery tips: always make backup copies of any and all media that comes through the case. Make copies as soon as possible, especially if the media is going to be sent elsewhere for examination. All it takes is a scratch on a CD/DVD or a hard drive dropped during transit to compromise the information.

Sometimes, the original media has to be returned to the original owner or turned over to opposing counsel for their forensic examination. Here, the copy comes in handy for comparing information that someone else has found, or for use in court when the original cannot be produced for any number of reasons.

Simply put, backing up electronic media should become an automatic habit for paralegals. Having copies saves time and headaches if a problem ever arises with the original piece of evidence.



Learn the Documentation Retention Policies/Schedules of the Client

Clients may or may not have a schedule for data retention. It is important that paralegals find out what the schedules and policies are for clients that do have them. The reason for learning this is two-fold. The first is if data from a certain date is going to be required, then it is easier to uncover if the information still exists. The other is that if it is getting close to the due date for a data dump, the word can be sent out to not overwrite or

delete files until they can be copied and secured. There is nothing worse than requesting information for a certain time frame, only to find that everything was cleared out two days prior.

Always keep in mind that businesses typically clear their data out on a regular basis, retaining only essential files. It is not practical or cost-effective for the company to constantly buy new hard drives the moment that they run out of room, so policies and schedules are instituted to save all but the most important files.

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Learn About Litigation Hold and its Application to the Opposing Party

A litigation hold is a notice and demand that informs the opposing party that they must

not delete certain files that could potentially be found during discovery. The information may be internal memos, emails, even voice mails that have been recorded to a hard drive. There is a series of court cases that clearly define the burden of the defense to produce electronic evidence and the punishment for failure to do so. The most famous of these cases is *Zubulake v. UBS Warburg LLC*, (*Zubulake IV*), 2003 U.S. Dist. Lexis 18771 (S.D.N.Y., Oct 22, 2003).

The litigation hold is also used when there is credible potential for a lawsuit to be filed. The hold is framed to request that the party hold onto certain data and keep it apart from scheduled deletion. A hold cannot ask that the entire database be kept aside, only the relevant information. Therefore, the party can dispose of the rest of their electronically stored information on schedule.

There must be full compliance on the served party's behalf for a litigation hold. This means informing everyone who comes in contact with the data to not delete. The order to hold files must be disseminated, no matter how inconvenient it may be.

Get Familiar with File Extensions and the Programs That Use Them

Certain programs open specific file types, such as Adobe Reader for .pdf files. The client is going to own software that is appropriate for his or her industry. As a result, files are going to come in with extensions that may not be easily recognized or opened with non-original programs. For example, a number of different programs can open up a .pdf file, whereas a .dwg file can

only be opened by a couple of programs.

Always be sure to ask the client about the programs that open up unfamiliar file extensions. Sometimes readers are available for free or a small purchase so the paralegal and attorney can open up the file at will. Otherwise, ask for a physical print out as well as a copy of the original file to make sure all angles are covered.

Learn Who Does What With IT for the Client

Paralegals are going to need to converse with the client's employees in order to get information as the case progresses. It is important to find out who has control over the IT department when eDiscovery is involved. Typically, the head of the IT department is the one who is going to oversee requests from the firm for information. Other employees may not be fully informed as to what is going on and may not be able to retrieve requested information. Dealing with one or two people also simplifies and speeds up information requests.

Stay on top of Changes in Technology

These eDiscovery tips are just the viewable part of the iceberg when it comes to gathering and organizing information for a case. Technology is constantly changing, and paralegals are well advised to stay abreast of the latest changes to data storage that hit the market.



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