

Data, data, everywhere!

What are you doing to protect your clients' data?

eDiscovery has challenged lawyers to develop new skills and procedures and to follow new rules requiring cooperation rather than belligerence. Despite lawyers' intensive efforts, the technologies that create data may outpace lawyers' development of the skills necessary to deal with that data.

Our initial challenges were to understand hard drives, thumb drives, servers, and e-mail systems. Then cloud services such as Gmail confronted us followed by social media sites such as Facebook, Twitter, and LinkedIn. Now we are warned about the Internet of Things and the evidence that might be found there because of fitness trackers, thermostats, and automotive systems.

That would be challenging enough, but the data is now everywhere. Nothing will affect our discovery practices more than the effects of the proliferation of devices that contain electronically stored information (ESI.) Pew Research Center recently reported that 66% of American adults have at least two of these data storehouses: a computer, a mobile phone, a tablet. 36% have all three, and among millennials, the percentage with all three is 51%. The ESI on these various devices may be copies of data stored elsewhere, but some of that data is unique to a particular device. For instance, text messages and many photographs may only exist on a phone.

However the story doesn't end there. Much of this ESI is backed up to additional locations. Apple's iCloud and equivalent cloud storage locations offer to synchronize all of our ESI and maintain copies at an Internet location. We can also backup our mobile devices to a computer at home or work. At either location, our computer may also backup to a dedicated hard drive. Data, and relevant ESI, can be anywhere and everywhere.

The impact of these findings and developments on the duty to collect, preserve, and review relevant ESI is substantial. When we realize that a gigabyte of data amounts to about 50,000 pages, we must acknowledge the need to develop

the knowledge, skills, and resources necessary to manage economically this mass of data. To do less would be a failure of our duty to provide competent representation.

This proliferation doesn't only impact electronic discovery. It also raises cybersecurity issues for our clients' and our own information. What is the level of protection afforded to our mobile phones and tablets? How are we protecting the information on our laptops? We have probably heard of an incident that occurred last year in San Diego. A lawyer's laptop was stolen after he left it on the MTS trolley. Though reported the following day to the police, it had not been recovered by the time that his law firm informed its clients that their confidential and personally identifiable information might have been contained on the stolen laptop and may have been compromised. The firm offered its clients identity theft protection and credit monitoring and gave them instructions about further steps they should take to protect themselves.

This is not the advice we will ever want to give our clients or the expenses that we will want to incur. But what are we doing to protect the confidentiality of the information on these mobile devices? And what are we prepared to do if and when a laptop, phone or tablet is lost or stolen?

These situations and questions are not simply hypothetical. Cybersecurity discussions are frequent today. One report stated that 80% of the country's largest law firms had been hacked. Another reported that employee error was the leading cause of data breaches. Law firms are evaluating and purchasing cybersecurity insurance to cover some of these risks. Firms are also training their attorneys and employees in order to minimize risk and to protect confidential client and propriety information. In this new year, we should ask ourselves if we are taking all necessary and appropriate actions?

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