

Discovery Is Not Getting Easier

Technological developments continue pushing legal professionals to keep up

Our county and state bars have each admonished us to come to grips with electronic discovery, retain or associate with someone knowledgeable, or decline any representation that might involve ESI. Frankly, we should probably drop the phrase “electronic discovery.” One well-quoted judge has observed: “I don’t know why we call it electronic discovery; all discovery is now electronic.”

Not so long ago, some attorneys would agree that they would not exchange electronic data. Some would agree not to bother with email. Those discussions still occur, but probably not as frequently. But similar discussions still occur regarding the contents of mobile phones, tablets, laptops, and information locations such as Facebook, Snapchat, and Instagram. We cannot ignore those devices and locations any longer. Some of us are getting better and making some strides in those regards. But the task is not getting easier.

Instagram reports uploads of 80 million photos each day. Facebook claims a billion daily users. Snapchat has over 100 million daily Snapchatters. And Twitter logs 500 million daily tweets. Obviously not all of this data is discoverable or relevant to one of our cases, but we cannot ignore the possibility that some of it is.

Moving on to other developments, how many of us have considered the data produced by the Internet of Things (IoT). The research firm Gartner, Inc., recently assessed the IoT, all the devices that use wireless connections and the internet backbone to report, transmit, or store information. Those devices include fitness trackers, wearable medical devices, home monitors, baby webcams, smart thermostats such as Nest, video doorbells, and the computer technologies in our cars. Gartner forecasts that 6.4 billion connective things will be in use this year, and the number will reach 20.8 billion by 2020. In 2016, Gartner believes that 5.5 million new things will get connected every day.

Every one of those “things” might contain or transmit information that should be preserved or discovered and might be evidence relevant to the disposition of a matter. Though we are still struggling with mobile devices and social media discovery, technological developments must motivate us to take greater strides to keep up with their progress. Take a look at one of the new IoT search engines, Shodan or Thingful, if you want to explore the possibilities.

Not only is all that information out there, but we are challenged to preserve, harvest, review, and produce it to litigation opponents. Our original legal review software and hardware is probably incapable of doing that. If so, what resources are available to us to accomplish those tasks?

We must become familiar with the technology that captures and interprets the contents of mobile devices such as Mobile Phone Examiner Plus (MPE+) and Cellebrite. To review and capture social media and internet accounts, we probably need to employ software such as X1 Social Discovery. For the IoT, we will soon see manufacturers and vendors suggesting that we use their technology to obtain and examine the contents of those things.

None of this is easy, and it will not get easier unless we pay attention to these developments and to our ethical responsibilities to our clients. There are lots of gigabytes out there, and each contains the equivalent of 50,000 pages of documents. We must stay informed and aware of both the challenges and the solutions.

But don’t despair at the task. There is help out there, experienced professionals who can help us to deal effectively and efficiently with almost any situation.

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