

Rock, Scissors, Paper...Electrons!

Why You Should Insist on Electronic Document Originals Instead of Printouts

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If you're a litigator, as I was for many years, you love paper. Lots of paper. But if you allow the other side to limit its responses to your discovery requests to paper only, you're falling into an avoidable trap. Fact (generally ignored by most attorneys): The vast majority of those paper documents are generated by computers. Fact (generally unknown to most attorneys): The electronic parent of each paper document contains a wealth of information which does not transfer to printed paper.

Unlike paper, where it's often difficult to identify an author or a source, computer files contain "data about the data," often referred to as "metadata." Metadata include such information as the date when the electronic file was created; when it was last modified; when it was deleted (yes, electronic files have a life after death); what software program generated it; and where it lived in the path and directory structure of the computer it was taken from.

Also, many electronic documents contain hidden information. For example, many word-processed files contain file fragments which allow a user to "undo" a deleted portion of the document. Further, the electronic original of a printed document may contain "tracked changes" which, when this feature is user enabled, give a complete audit trail of edits made to the document. Such information can reveal interesting thought processes and strategies unavailable in a mere printout.

Other examples of useful data retained in the electronic original but lost in printouts:

- formulae used to calculate fields in spreadsheets;
- hidden columns and fields in spreadsheets and databases;
- "sticky notes" attached to documents made by collaborators on a project or a document author wanting to share information or reminders "outside" of the document itself;
- e-mails containing metadata showing whether they were read or ignored

Other reasons why it is critically important to obtain discovery of source electronic data either in lieu of or in addition to paper:

1. Increasingly, discoverable information exists only in electronic form. It is estimated that as much as 30% of all corporate information is never printed out. E-mail, often the richest source of "smoking guns" as Bill Gates himself learned

in the Microsoft antitrust trial, is rarely printed out. E-mails in turn are often linked to attached documents that cannot be accessed in a printout.

2. Electronic documents are easily searched with any number of software products.
3. Electronic data are much easier to copy and distribute than their lesser, data-poor paper cousins. Because millions of bytes of electronic data can be easily stored on a handful of CD-ROMs costing \$1.00 apiece, electronic data are easily transported and copied. This aids the efficient communication and collaboration of persons involved in a lawsuit, whether it be lawyers and support staff within a firm, with co-counsel, with clients, or with the court.
4. Electronic data can be easily indexed and "mined" with sophisticated, state-of-the-art software. Through artificial intelligence, data mining tools group documents that are related to each other by content. The results reveal relationships between related documents based on recurrent themes, themes which may not be evident to either you or your client until revealed by data mining.
5. Because backup media for computers have become so cheap and pervasive, electronic documents are simply stored *en masse* without consideration to their content or size. Paper, on the other hand, takes up space that costs money; it's even more expensive to archive and index; and there's the social and political pressure to recycle it when there's too much of it around.
6. Once relevant electronic data are found through searching or data mining, the information found can be easily inserted into databases or word processors for organization and presentation as trial evidence.
7. Using computer forensics tools on hard drives, "deleted" files can be reconstructed. When a user "deletes" a file, all he or she does is remove a protection for that data in the master address system of the computer. Thus, it is possible to recover many "deleted" files and file fragments in electronic discovery, something not possible with paper discovery.
8. Electronic discovery can also unearth digital data of the sort never to be found on paper, including voice mail, for example. The technology to search and "mine" voice mail is just on the horizon.

As you would do with any other field with which you might be unfamiliar, getting expert advice to assist you in finding, capturing and using electronic evidence can pay rich dividends.

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