

Articles

"E-mails, Computers and the Courthouse"

Joe C. Holzer

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Joe C. Holzer (P.C.), Andrews & Kurth L.L.P., Houston Office, born Los Angeles, California, 1951; admitted to bar 1976, Texas; United States District Court for the Southern District of Texas; United States Court of Appeals for the Fifth Circuit. Education: University of California (B.A., 1973); University of Houston (J.D., 1976).

In the 1970s lawyers focused on the testimony of witnesses in preparing and trying lawsuits. In the 1980s the trickle of paper discovery soon became a flood of paper, resulting in an entirely new industry of document copying firms. This trend continued into the courtroom over the production of documents. Complex cases, and sometimes even simple cases, routinely involved the production of tens of thousands and even hundreds of thousands of pages of documents. Just to keep track of these documents, database software had to be developed. The decade commencing in the year 2000 will see a similar trend in the expansive production in court cases of electronic data consisting of e-mail and stored documents.

What will be the impact of this trend? Lawyers will likely see specific requests for production of the e-mail and other computer files of persons involved with the underlying facts of the case. Since e-mail fosters an informal style of communication, much like a telephone conversation, unless employees understand that their e-mail may be read to a judge and jury some day, the production of e-mail could cause unintended results in the courtroom. A telephone conversation is generally not documented, whereas e-mail, by its very nature, is well documented.

One of the better known examples of the use of internal e-mail against a party is the antitrust case filed against Microsoft by the United States. Much of the government's case has been built upon internal Microsoft e-mail—the authors of which never intended their e-mail and the thoughts contained in the e-mail to be publicized in that fashion.

Given the uncontrolled spread of e-mail, what should a company do? The first thing is that employees should know that their e-mail can be—and at some time probably will be—subject to discovery. Any statements made in e-mail could be subject to extensive postmortem review by lawyers in the event that disaster strikes and a lawsuit is filed. Even if a company has a deletion policy relating to e-mail, employees should assume that a recipient has either saved or printed the e-mail and kept a hard copy. An e-mail deletion policy should be in place, although it is never safe to assume that just because an e-mail file has been deleted that it cannot be discovered by any other means. Many files are automatically archived, and a deletion is not really a deletion until it has been overwritten by other data or information.

The same general advice applied to files that are stored electronically. All of these are fair game in a request for production. Again, if an employee would cringe at the thought of his/her files being scrutinized by opposing counsel, a jury, and the judge, then the employee should think twice about creating the file in the first instance. This is easier said than done, of course, especially when the employee is thinking of getting an edge on the competition or closing a deal.