

Article

Know What to Ask—Ensuring a Successful E-Discovery Request

Electronic discovery may be at the crux of a case in proving the culpability of the opposing party but when the requesting party is not careful in their request for electronic evidence, they could face the possibility of losing key information that would have otherwise provided a favorable resolution to their case.

When requesting electronic discovery, there are certain essential issues to consider. Under the Federal Rules of Civil Procedure, Rule 26(b)(2) states the courts have the power to limit discovery if the court finds that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Consider the following case laws whereby a party's request for discovery has been denied due to one of the limiting factors above:

- **Farmers Insur. Co. v. Peterson**
2003 OK 99; 81 P. 3d 659 (Nov. 25, 2003)
Oklahoma Supreme Court overturns a district court's discovery order that compels an insurer to search three years of claim files in both electronic and paper formats. The court held that an inspection of three years' worth of paper and electronic documents is unduly burdensome.
- **Wright v. AmSouth Bancorporation**
320 F.3d 1198, 2003 US App. LEXIS 2016 (11th Cir. Ala. 2003)
When plaintiff requested discovery of computer disks and tapes that contain two and a half years' worth of word processing files that were created, modified or accessed by five of defendant's employees, the court denied the motion to compel, stating that the request was overly broad.

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Request for ALL electronic data will likely get an objection based on burden or expense. The courts do not look favorably upon electronic “fishing expeditions.” When formulating a request, keep in mind the following:

1. **Target a reasonably large scope of computers; however, provide highly specific and relevant keywords for the search, rather than ALL data, and avoid generic keywords that generate false hits.**

In the information age, electronic data resides in various locations outside of one’s regular workstation. Apart from desktop computers and laptops, one can also find data in PDAs, servers, removable drives, and even cell phones, just to name a few. To be thorough, the requesting party must identify all of the possible systems that could contain electronic evidence.

2. **Once these devices are targeted, be prepared with a list of keywords that are highly relevant to the case.**

Avoid using generic terms; for example, when looking for the term “People’s Energy,” utilizing search terms like “people” and “energy” separately could generate a number of completely irrelevant hits like “Red Bull Energy Drink” or “Soilent green is people”—well, you get the gist. The more specific the keywords, the less time spent searching through vast amounts of useless data.

3. **Narrow production of files by requesting documents with a specific time range (Files accessed, modified, created, or deleted, before x but after y).**

Instead of asking for files created in 2001 and 2002, if you know of a more specific timeline, you could possibly eliminate other useless information. For example, seeking files created, modified and deleted between Nov 3, 2001, which was when employee first gained access to a confidential database, and Jun 4, 2002, two weeks after employee’s resignation, is a more effective method of finding accurate information. By narrowing the pool of data, you had cut cost and labor.

4. **Request file listings with preview of the hit text for review prior to producing actual files. This step will save time and money.**

After performing the search using relevant keywords, instead of immediately printing the results, you should request a preview of the hits and the accompanying text and print only files that are most pertinent to the case.

This step may seem laborious (reviewing countless electronic files) but, in the long run, it will save on cost and time—sifting through a large stack of paper documents could be more challenging than navigating electronic files.

5. **Eliminate known file types using the NIST hash database.**

NIST (National Institute of Standards and Technology) has a list of computer file types that automatically reside on every computer. These are system files germane to the operation of the system, rather than one generated by an end-user. This will eliminate files that will not contribute to the discovery process, which will save you time.

6. **Find an expert to filter keywords; otherwise cover-up deletions are unlikely to be detected.**

Keywords could be tricky. Devious employees may try to cover their tracks with various means that could be alien to the eyes of a regular, non-technical employer. An expert can comb through files with a filtering system that may unearth the cover-ups. Electronic discovery and computer forensic experts who are experienced in investigating electronic information will be essential in uncovering information deliberately hidden from untrained eyes.

7. **Avoid objections based on burden by agreeing to data sampling.**

When discovery involves a large volume of data that reside in backup tapes—a media that requires more time-consuming and expensive methods in data retrieval—the process could prove unduly burdensome and costly, which will likely elicit objections. There is a growing trend whereby the requesting party works with opposing counsel to devise a court-approved method of using a statistical sampling protocol that gathers information from a small pool of data—this way, the initial sampling will show if evidence exists before ordering the producing party to relinquish the entire collection of information for the search. For this procedure to yield positive outcome, the requesting party should ask for tapes that they think most likely contain the electronic evidence. See *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003), where the court ordered a sample production and search of five backup tapes instead of all 94.