The Report Card

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Are Your Information and Record Keeping Systems Ready for the New Federal Rules on Electronic Discovery?

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On December 1, 2006, amendments to the Federal Rules of Civil Procedure involving electronic discovery went into effect. The new e-discovery rules have prompted businesses nationally to take a fresh look at their document retention policies and information management systems in light of the demands imposed by the new rules. Notwithstanding erroneous reports that the new rules require school districts to retain all electronic documents in their possession as well as all e-mail and instant messages (IM) generated by their employees, Illinois school districts should follow suit.

Why New E-Discovery Rules?

For years, defendants have fought the popular belief that electronic and paper records are essentially the same for discovery purposes and that electronic information or e-mails might be produced by merely pressing a button. In fact, there are many significant differences.

E-discovery involves an exponentially greater volume of potentially relevant information than traditional paper discovery. Hard drives with capacity measured in terabytes can now be purchased for $400. According to a 2003 University of California at Berkeley study, it would take an estimated 50,000 trees to create enough paper to record one terabyte of information (see http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/), and the entire Library of Congress can be downloaded onto 10 terabytes of storage. Because of the larger volume of information involved, the cost of reviewing and producing electronic information can far exceed that of reviewing and producing paper discovery. In fact, defendants in several reported decisions spent hundreds of thousands of dollars producing back-up tapes.

Moreover, whereas the locations where a company stores its paper records generally can be readily identified, determining where electronic information is stored can be challenging. Potentially relevant electronic information can be found on workstations and laptops; file, application and network e-mail servers; back-up media; personal digital assistants (PDAs) such as Blackberries and Treos; voicemail systems and smart phones; portable storage devices such as pen drives, iPods, DVDs, CDs or floppy disks; website blogs; third-party e-mail hosts; intranets; and even home computers.

E-discovery also includes metadata, or "data about data." Although metadata cannot be viewed when a document is printed on paper or when viewed on a computer screen, all documents created on a computer and every e-mail sent or received contain it. In Microsoft Windows, a document's basic metadata can be viewed by clicking on the "File" button on your computer's toolbar and then scrolling down and clicking on "Properties." There, information such as the document's author and date of creation, the number of versions of the document that have been created, and the persons who have revised or had access to the document can be found.

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So, when an attorney shares a document with a client, and the client makes changes or comments to it, the tracked changes are embedded in the electronic version of the document and not easily removed. This makes privilege reviews more complicated and expensive. If such a revised document is e-mailed to a third party without first scrubbing its metadata, potentially privileged information may be inadvertently produced.

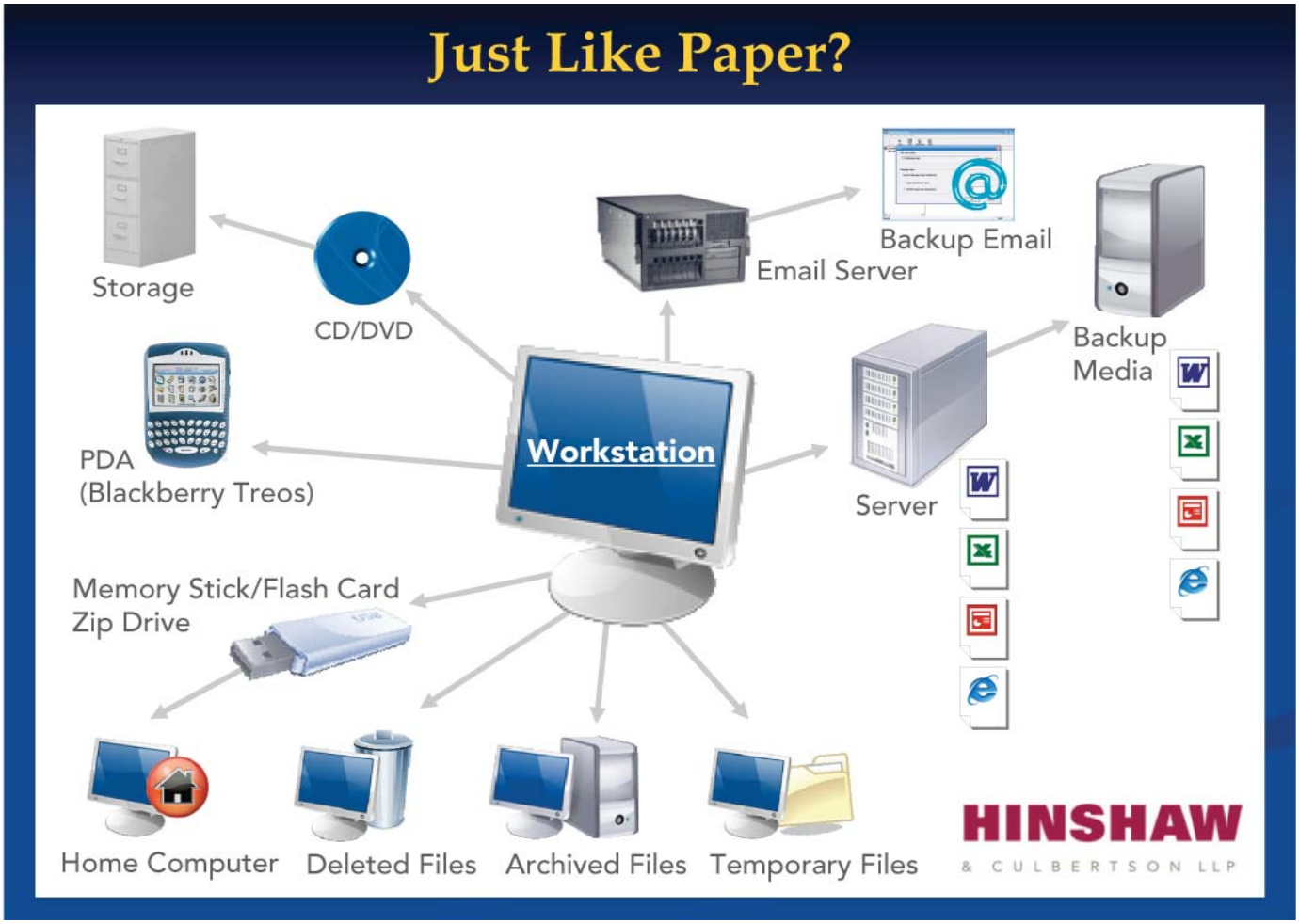
The differences between electronic and paper documents go even deeper. For example, paper documents may be permanently destroyed by shredding them. But the apparent electronic equivalent of shredding, hitting a computer's delete button, does not necessarily permanently destroy an electronic document. A binary code assigned to the document's location on the hard drive is merely changed so your computer cannot find the document. Until the document's location on a computer's hard drive is actually overwritten by the computer, the deleted document remains hidden on the hard drive, capable of being at least partially found through a forensic examination of the computer. However, several fields of the document's metadata can be altered fairly simply by opening the document or moving it into a new file. Further, unlike with paper discovery, electronic documents cannot be labeled, numbered or electronically searched when produced in certain electronic formats. These and other distinctions between paper and electronic discovery prompted the new federal rules.

What The E-Discovery Rules Require

The new e-discovery rules permit discovery of any type of digital or electronic information that is stored in any type of medium. They address discovery of "electronically stored information," a term deliberately left undefined because of the wide variety of computer systems in use and the rapidity of technological change. The rules are designed to be broad enough to cover all current types of computer information and flexible enough to address future technological developments.

The rules set up a two-tiered discovery system for electronically stored information. So while parties to litigation are required to produce potentially relevant electronic records that are "reasonably accessible," electronic information that is "not reasonably accessible because of undue burden or cost" does not have to be produced unless the opposing party can show good cause for needing it.

Before the new rules were enacted, several courts imposed sanctions for failures to properly preserve electronic information. The new rules provide some protection against such sanctions where a loss of documents is caused by the routine operation of the party's computer system, so long as the party acted in good faith. To show good faith, the party must have imposed a litigation hold and suspended any features of its information systems that could result in the automatic disposal of potentially



relevant electronic information. The automatic recycling of back-up tapes and the automatic deletion of e-mails after a specified time frame are common systems features that, for purposes of satisfying the good faith requirement, must be temporarily suspended when a litigation hold is issued.

The rules mandate early attention to e-discovery issues by court and counsel. They specifically require the parties to the litigation to meet and discuss issues involving the preservation and production of electronically stored information before the first discovery scheduling conference with the court. To negotiate a fair e-discovery plan and demonstrate why certain electronic information is not readily accessible, counsel must be intimately familiar with his or her client's information systems and document retention policies. Clients should therefore provide counsel with such information.

In light of the new e-discovery rules, Illinois school districts should review their document retention policies and practices, asking if they: (1) cover both paper and electronic documents as well as e-mail and IM; (2) require the preservation of potentially relevant e-mails and electronic information when litigation is reasonably anticipated, and spell out how a litigation hold should be instituted when a preservation obligation is triggered; (3) comply with the latest requirements of the Open Meetings Act; and (4) recognize that certain types of e-mails or other electronic communications may fall under the ambit of the School Students Records Act or be subject to the preservation obligations of the Local Records Act.

School districts should also inventory their information management systems and map out their structure. The inventory should include the configuration of network servers and workstations; identification of all computer and the operating system(s) in use, including all software applications and how access to particular applications or files are controlled; those employees who have access to the various applications or files on the system; and the backup and archiving procedures for all applications or data on the systems. The inventory should be periodically updated as school district systems change.

Taking a proactive approach will save significant time and expense for both the school district and its counsel when and if suit is later filed.

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First Amendment Inapplicable to Teacher's Classroom Speech

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The United States Court of Appeals for the Seventh Circuit, in *Mayer v. Monroe County Community School Corporation, et al.*, 474 F.3d 477 (2007), affirmed a summary judgment ruling by a federal district court rejecting a teacher's claim that her First Amendment rights were violated when a school district failed to renew her employment contract because she took a political stance against the Iraq war during a current events session in her classroom.

Plaintiff, Deborah Mayer, had worked for one year as a probationary elementary school teacher, but the school district did not renew her contract for a second year. Mayer consequently filed her suit. She alleged that "she answered a student's question about whether she participated in political demonstrations by saying that when she passed a demonstration against the U.S. military operation in Iraq and saw a placard saying 'honk for peace,' she honked her car's horn to show support for the demonstrators." *Mayer,* 474 F.3d at 478. Mayer contended that it was that incident that led the school district to dismiss her.

The district court found that the subject of military intervention in Iraq is an issue of public importance. Mayer, therefore, had a right to express her views on the subject. That right, however, is qualified in the workplace and the expression can not unduly disrupt an employer's business. Concluding that the employer school district's interests predominated over the teacher's right to express her political views at the workplace, the district court granted the school district's motion for summary judgment.

The Seventh Circuit affirmed. The teacher's speech took place in the classroom while she was teaching current events. She obtained approval to teach about the Iraq war provided that the class discussed all sides of the issue and that she refrained from sharing her personal opinions. As the speech unquestionably took place within the context of her official duties, it was subject to the direction of her employer. She was not speaking as a citizen at the time the speech took place, and her speech was not protected by the First Amendment or principles of academic freedom. The Seventh Circuit explained, "[T]he school system does not 'regulate' a teacher's speech as much as it 'hires' that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. . . [She, therefore,] must provide the service for which employers are willing to pay. . ." *Mayer*, 474 F.3d at 479. The court concluded that the First Amendment, "does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics or advocate viewpoints that depart from the curriculum adopted by the school system." *Id.*

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H-1B Visa Petitions Must Be Prepared Now

Penelope M. Lechtenberg

H-1B is a nonimmigrant status granted by the United States Citizenship & Immigration Service (USCIS), permitting foreign-born individuals to work for a sponsoring employer in a "specialty occupation." For USCIS purposes, a specialty occupation is one which legitimately requires, at minimum, a bachelors degree (or its equivalent) in a particular field. This status is commonly used for employing, among others: doctors, teachers, engineers, scientists, business, managerial, computer and financial professionals. The USCIS grants 65,000 new H-1B approvals per fiscal year. April 1 is the earliest possible filing date for the new H-1Bs (in this case, the FY2008 H-1Bs). Last year, the 65,000 available FY2007 H-1Bs were exhausted in late May (about 7 weeks after April 1). This year, they will most likely be exhausted much sooner. Employers anticipating the need to file an H-1B petition on behalf of a new H-1B worker for employment any time during 2007 or early 2008 are advised to prepare the petition in March 2007 and file it as early as possible in April 2007.

Note that foreign teachers participating in the ISBE's Illinois/Spanish Visiting Teachers program have J-1 visas and are not subject to the same timing concerns associated with H-1B applications.

If you have any questions about the H-1B process or need assistance in preparing an H-1B petition, please feel free to contact **Penelope Lechtenberg** at plechtenberg@hinshawlaw.com.

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