Need to catch up on technology ethical obligations? Start here

Editor's note: This is the first in a series of articles from the State Bar of Montana's Technology Committee aimed at helping lawyers understand their ethical responsibilities and responsibilities under the Montana Rules of Civil Procedure regarding electronically stored information and technology.

By Gregg Smith and Chris Gray

Given recent discussions of the State Bar of Montana's Ethics Committee suggesting that a basic understanding of technology issues could be considered an ethical, competence issue, the Technology Committee of the State Bar will be reaching out to Bar members on a more regular basis to provide background related to technology. This piece is the first in our efforts, focusing on the 2011 changes to the Montana Rules of Civil Procedure governing the discovery of electronically stored information.

If these new Rules 'snuck up' on you a bit, don't feel bad. They caught some of us off guard as well. Hopefully we will be able to help you play catch up, just as we are doing.

What is "electronically stored information," or ESI? It is not defined in the Montana Rules of Civil Procedure. According to *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, Kenneth J. Withers, Northwestern Journal of Technology and Intellectual Property, Vol.4 (2), 171, ESI is "information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software." Obviously, this is an extremely broad definition that could include, at a minimum, emails, electronic documents (.pdf files, .docx files, etc.), database information, social media account information, and a multitude of other types of data some of which, given the modern pace of technological change, might not even exist today.

Important, too, to the above analysis is the fact that some ESI is not a discrete 'document' or 'item,' but instead information to be drawn from a computer or electronic system. For example, one could seek all letters sent from party "A" to party "B," and those would presumably be a finite number of documents. Alternatively, someone might seek a list of all railroad workers who suffered a particular injury while working in a particular trade; in such a situation, the requesting party is not seeking a collection of 'things,' but instead information that is to be drawn from a larger 'universe' of information.

This distinction gives rise to the most significant addition to the Montana Rules of Civil Procedure, the concept of accessibility. Rule 26(b)(2)(B), provides:

> (B) Specific Limitations on Electronically-Stored Information. A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

As a practitioner on either end of a request for ESI, then, one must change his or her approach. As a requesting party, no longer can one merely shoot off the "produce each and every email" or "identify each and every case" requests, because in addition to the usual "overly broad and unduly burdensome" objection, now one will be faced with an objection that the information is "not reasonably accessible." Now, when seeking information stored in an electronic format, one must be cognizant of the nature and limitations of the format, and tailor the requests accordingly.

This gives rise to a new issue. Now a requesting party must first know what system or systems the information is contained in and must possess at least a passing familiarity with the features and limitations of such systems. In a cooperative litigation environment, the former might be determined merely by asking. In an antagonistic environment, though, it might first be necessary to conduct discovery about the *system*, before one is in a position to ask the substantive question(s) about the *information*.

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their activities and interactions with citizens. With more than 1.1 million enforcement-involved cases in the justice system, he believes that the recent negative events in the news represent a miniscule percentage of the overall interactions. However, he believes that video recordings will help law enforcement officers more than hurt them.

He and Sandy are looking forward to spending time in the Florida Keys in February, and may make that trip an annual event. While he enjoys reading a book just as much at Georgetown Lake as he does on a beach in Florida, he knows that Sandy enjoys the warm sunshine and sandy beaches, and he doesn't pass up the opportunity to go fishing, no matter the location. For their 50th wedding anniversary, he and Sandy and all of their children and grandchildren are planning a trip to Ireland. He will visit the house of his grandfather Tim Tracy [spelled "Treacy" while in Ireland], outside of Waterford. He is proud of his Irish heritage, and as a founding member of the Ancient Order of Hibernians has been instrumental in making St. Paddy's Day in Missoula a family celebration.

McLean has served for 26 years as a District Court Judge and is the senior District Court Judge of the Fourth Judicial District. His tenure began with a controversial case and comes to a close with another that gained international notoriety. Soon after he was appointed, he sentenced Joe Junior Cowan, a man who suffered from paranoia and delusions and who viciously assaulted Maggie Dougherty, a Forest Service ranger. The case raised questions about whether a person suffering from a mental illness could be criminally responsible for actions taken while delusional. More recently, he presided at a trial that received national and international news coverage, the case of Marcus Kaarma, who was found guilty of homicide for shooting a German teenager he found in his garage. But, no matter the case before him or situation, McLean has followed in the footsteps of his father, standing up for what he believes is right. From humble beginnings, he has applied common sense to well-established principles of justice, and worked with integrity to protect victims, children, and Montanans' constitutional rights.

As he simply says, "It has been a good run."

Leslie Halligan is a standing master in the Fourth Judicial District, covering Missoula and Mineral counties.

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Once the limitations of a particular system are known, then it will require a practitioner to carefully draft the request to ensure that it seeks information that is accessible. Of course, the answering party will also need a working knowledge of the applicable system in order to offer complete production or, in the alternative, to object on accessibility.

Given a discovery deadline of 5-6 months, it is easy to recognize how this new language will impose a significant burden of diligence and competence in order to work through these issues in time to satisfy the demands of a scheduling order.

Rule 34, M.R.Civ.P., also impacts the efforts to obtain ESI. First, Rule 34(a)(1)(A), allows a party to request "any designated documents or electronically-stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." While we have no guiding case law, one can see the interplay between the question of whether information is "reasonably accessible," and whether that information can be translated into a "reasonably usable form."

We suggest that these disputes, if they arise, will turn primarily on the burden associated with production. Many understand that information can sometimes be saved from even a crashed hard drive. But, the question becomes, at what cost? Assume that 10-year-old information is available from data backup tapes. What if the format of the tape backups is no longer in general use? Who should pay the significant expense in locating appropriate search software and applying it to the old data, especially when this expense can easily run into thousands upon thousands of dollars? We believe that these 'balancing issues' will become ever more prevalent as we continue our march forward into technological progress.

The final significant change to the Rules of Civil Procedure can be found in the text of Rule 37: "Failure to Provide Electronically-Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system." This is the 'other side' of the question. What if the information is requested, what if it is reasonably accessible, but what if it no longer exists?

There is no present rule in Montana requiring a person or entity to maintain email backups for a particular length of time. If you archive your emails after a year, and delete them after two, are you engaged in the "routine, good-faith operation of an electronic information system," or are you spoliating evidence? Like the question of what is reasonably accessible and the question of what is a reasonably usable form, the question of what is routine and good-faith will turn on the facts of a particular case. (This also elevates the importance of a litigation hold letter, whereby a party is instructed not to delete anything pending the outcome of the litigation.)

Obviously, a brief article in the Montana Lawyer will not be able to answer the questions of what is reasonably accessible or what is good-faith destruction of evidence, especially when we do not have a developed body of case law on these questions. It is our hope, though, that a Montana practitioner now at least has enough information to be aware (and wary) of the issues raised by the changes to the way ESI will be addressed in Montana state courts.

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