

Demand for Remote Desktop Access and Cloud Computing Services Necessitates a Refined Approach for Civil Litigation Electronic Discovery

Lawyers' Journal

November 18, 2022

By Gregory P. Graham

Shifts in work habits brought about by the COVID-19 pandemic have forced employers of all sizes to improve their capacity to provide functional work capabilities to remote users. The accompanying increase in demand for remote desktop access and cloud computing services necessitates a refined approach for civil litigation electronic discovery. Traditional efforts often first focused on the identification of data custodians and user devices, but now inquiries should be broadened to include an emphasis on data mapping, particularly as to an organization's network architecture. The prioritization of this effort will assist solo and small-firm practitioners, as well as attorneys with more established e-discovery support, in handling the unique burdens of discovery management relating to web-based remote work access services.

Although the height of the pandemic appears to have receded, full-time remote work and flexible remote policies have become the new norm for a considerable portion of American workers. A U.S. Bureau of Labor Statistics working paper notes that although remote work rates have fallen since late 2020 and early 2021, teleworking rates have varied between 13 and 35.4 per-

cent (Dalton, Dey, and Loewenstein, 2022)¹. This need for remote work access has been met by an increase in the adoption of cloud computing across various industries.

In its simplest form, cloud computing is the online delivery of computing services. Server access, storage, database usage, networking, and software are all hosted and delivered remotely. Customers pay for the computing services they require, which reduces operating costs and eliminates the need for on-site servers, hardware, and maintenance. While cloud computing is nothing new, the realities of social distancing and lockdowns posed a problem that it was perfectly-suited to fix. Cloud computing, as well as remote desktop software options that allow users to access systems remotely as if they were seated at their own "desk," provided a cost-effective means of maintaining worker productivity throughout the pandemic.

The implications for e-discovery as a result of an increased usage of these services are fairly straightforward, although often overlooked. Remote, web-based access through

¹ Dalton, M., Dey, M., & Loewenstein, M. (2022) "The Impact of Remote Work on Local Employment, Business Relocation, and Local Home Costs" <https://www.bls.gov/osmr/research-papers/2022/ec220080.htm>

cloud computing and remote access software allows users to access, edit, and download a company's files, software applications and data to a remote location. Cloud computing in particular facilitates a collaborative approach to document creation and data management. Consider employees who began the pandemic without a company-provided computer and worked collaboratively on material with other remote employees via their own personal desktop, but then may have later transitioned to a work laptop. Or consider virtual collaboration on a document during a Microsoft Teams or Zoom meeting. Data is likely saved on the local drives of multiple devices, the memory of the applications being used, as well as within the cloud's hosted storage itself.

Cloud computing and remote access options clearly affect the scope and implementation of a litigation hold, the identification of custodians and devices, and the collection and ultimate production of Electronically Stored Information (ESI). Although cloud computing issues existed pre-COVID-19, practitioners handling matters that have arisen since the pandemic must take particular care to perform an early evaluation of any web-based remote access framework's impact on e-discovery. A solution to reduce the challenges that cloud computing and remote access services can create for e-discovery is for lawyers to incorporate a focus on "data mapping" into their initial inquiries at the onset of every matter. Data mapping allows for an overview of the whole of an organization's IT architecture, and provides more information that would address some of the challenges raised by cloud-based computing services than a traditional focus on particu-

lar custodians and the devices that they have used.

Data mapping is the identification and inventorying of an organization's potentially discoverable data. This will usually include the identification of: 1) the types of data an organization generates, uses, and stores; 2) its format and accessibility and whether it is web-based to all or only some employees; 3) the backup procedures and records retention policies in place; 4) the determination of whether an organization's IT structure is hardware-based or web-provided; 5) the identity of any cloud computing provider; 6) and the scope of the cloud-provided services (whether it is infrastructure, platform, or software or some combination of all three). While many courts, including the Western District, provide checklists for e-discovery, they tend not to focus on mapping the entirety of an organization's IT structure, nor have they been updated to address post-pandemic remote work realities. Attorneys should emphasize these points of inquiry before they shift focus to local custodians and devices.

Comprehensive data mapping inquiries provide attorneys with an early understanding of the scope of a matter's e-discovery, inform any cost management considerations, and ease the burden on the identification and collection of ESI. Additionally, a thoroughly-performed data mapping effort will more than likely be in compliance with any federal or state obligation to investigate e-discovery. Broadening the focus of inquiries from the end user to the system structure will also encompass the nuances created for e-discovery by cloud computing and remote desktop access services.

While data mapping might seem daunting at first glance, it does not place any more of a burden on the attorney or the client and, helpfully in a post-pandemic world, these inquiries can all be handled remotely.



Gregory P. Graham is an associate in the Pittsburgh office of Marshall Dennehey, where he focuses his practice on complex civil litigation and class action defense. He may be reached at gpgraham@mdwcg.com.