

Preserving Electronic Materials

A Practical Guide

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Much has been written about the processes that need to be taken to produce electronically stored materials for litigation. But, before counsel can even get to the point of collecting the information for production, making sure that the evidence has been adequately preserved is imperative. This obligation to preserve data in electronic form is no different than in paper discovery. However, the swiftness with which electronic documents may be destroyed makes the process more challenging and demands immediate attention from attorneys as soon as litigation is anticipated. Failing to preserve electronic materials, even if the failure is inadvertent, can result in sanctions or adverse jury instructions. A number of steps can be taken to preserve documents before and during litigation, and various resources are available to aid this process. These steps are explored below.

A Preservation Checklist

The obligation to preserve electronic data begins once a potential party *reasonably anticipates* litigation. At this point, a party must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure that all relevant documents are preserved.

Because the obligation for such a hold originates as soon as litigation is anticipated, make sure that you regularly educate clients regarding document retention, so that they are not surprised by this development when it arises. In-house counsel must periodically advise employees of the significance of these preservation obligations. The company should consider addressing this issue in a company's code of conduct and when training and auditing employee compliance with internal policies.

Issue the litigation hold in writing. Although a general hold may be made initially, once key players are identified, communicate it directly to them. Have a standard litigation hold letter that you send not only to the general counsel and heads of business units involved in the litigation but also to persons in possession of documents that need to be preserved. The letter should inform the client and employ-

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ees of the types of documents that need to be preserved (i.e., e-mail, voice mail, calendars, those stored in handheld devices), the relevant time parameters, the subject matter of the materials, and specific instructions on how to preserve the electronic materials.

Understanding your client's electronic retention system and policies is essential. This entails communicating with the key players and your client's information technology department. The new proposed Federal Rules of Civil Procedure, scheduled to go into effect in December 2006, require counsel for all parties to meet and confer regarding the types of electronically stored materials that will be produced and their method of production. In addition, to facilitate discussions of the timing of production and to come to an agreement on discovery scheduling orders, you must understand the volume of materials that need to be reviewed and potentially produced.

When investigating a client's document retention policies, ascertain whether the client has an automatic e-mail destruction policy or if the decision to delete is solely left to an employee's discretion. Likewise learn whether backup tapes are recycled and the length of time they are kept. Make sure that all backup media that the party is required to retain is identified and stored in a safe place. If necessary, segregate the relevant backup tapes so they will not be inadvertently recycled. Neither the new proposed federal rules nor the case law discussing electronic preservation require the automatic production of backup tapes. However, preserving the relevant tapes is important, especially if your client recycles backup tapes on a regular basis.

Counsel also must interview the main actors to determine how they store and use electronic information. Does a person use a laptop or save voicemail messages on an office or cell phone? Does he or she routinely delete electronically transferred information? Determine if the employee keeps an electronic calendar or a handheld device and whether it is routinely synched to the company's system. Do not forget that, with the vast volume of e-mail, many persons assign support staff to manage and respond to certain types of e-mails. In such cases, the files maintained by administrative assistants of these essential persons may need to be preserved as well.

Once these actors have been identified, create electronic copies of their relevant electronic files so they are preserved for review.

Throughout this process, keep a log of the instructions given regarding data preservation, a list of the people contacted, and the

steps taken to preserve data. This way, if opposing counsel in litigation makes spoliation claims, you will have a record of the good faith efforts extended to preserve the relevant data. As with paper discovery, the extent of what will be produced varies, depending upon many factors. Nonetheless, cataloging and understanding all sources of potential electronic documents, even if they are not all produced, is crucial. (The cost to retrieve electronic data is a factor considered in determining what will ultimately be produced.) Armed with an accurate catalog of your client's electronically stored data, you will be well poised to make decisions and have factual information to support the decisions surrounding document production issues.

At this point, you are ready to design your production plan. However, counsel has a continuing duty to make sure that potentially relevant materials are preserved. Document productions are not on the minds of persons going about their daily work. Therefore counsel must periodically remind clients of their preservation obligations.

E-Discovery Resources

The new proposed Federal Rules of Civil Procedure and the comments to them are an essential guide. For a copy, go to www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

More helpful information can be found at the Web site of the Sedona Conference, which has produced *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Sept. 2004) and other articles on e-discovery. These may be found at www.thesedonaconference.org/content/miscFiles/publications_html.

As a starting point for research on the most up-to-date decisions on e-discovery issues, including scope of discovery and cost shifting, two very comprehensive sources can be found at (1) www.krollon-track.com/ediscovery, where you can sign up for automatic monthly notices on new cases; and (2) www.kenwithers.com. Withers works for the Federal Judicial Center and maintains this personal Web site to assist counsel with electronic discovery issues.

The Federal Judicial Center (www.fjc.gov) provides information on e-discovery and also has a PDF version of the most recent *Complex Litigation Manual* at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/470. Section 40.25(2) contains topics for discussion in a meet-and-confer session regarding production of electronic discovery

The Electronic Evidence and Discovery Handbook: Forms, Checklists, and Guidelines by Sharon D. Nelson, Bruce A. Olson, and John W. Simek was published this year by the ABA. For information about the comprehensive text, extensive electronic evidence case digest, and accompanying CD-ROM with over 70 forms in Word format, go to the ABA Web Store at www.ababooks.org and enter Electronic Evidence in the store browser. ❖