White Paper

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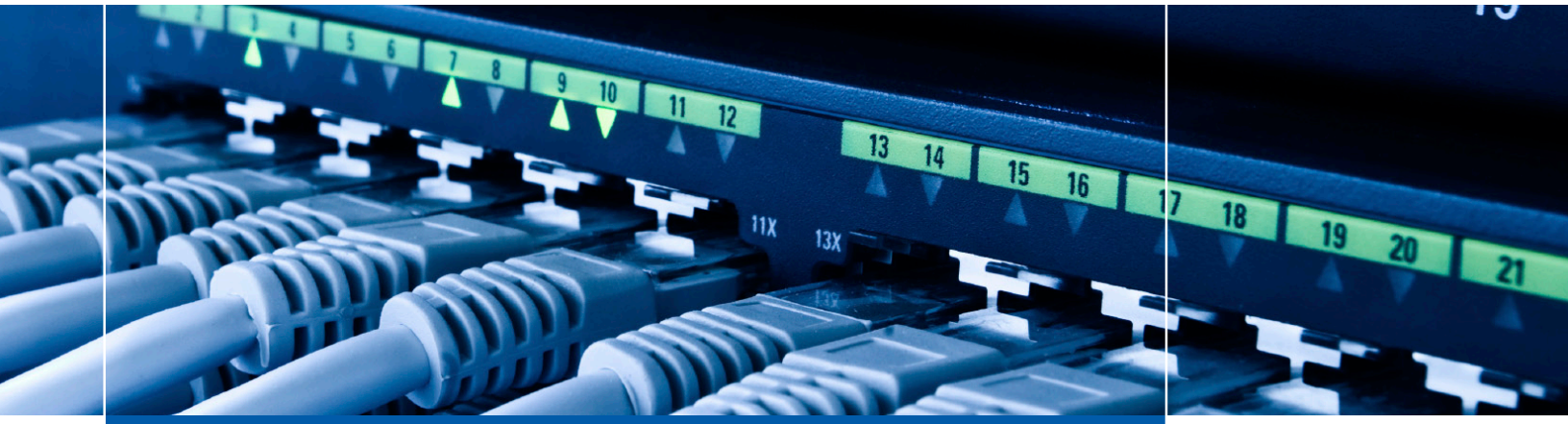

Retention, Preservation — What's the Difference?

Different and conflicting requirements may govern how the same information is maintained, how long it must be kept, and whether and how it is protected and secured.

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OVERVIEW

At any given moment, the same information can exist in multiple "states," meaning the purpose for which the information is kept, rather than its physical location or medium.

For example, consider an executed contract to which the company is a party. First, the hard copy original or a properly imaged and designated digital version may be the official business record of the contract. Second, there may be several reference or convenience copies of the executed contract in different parts of the company. Third, the digital official version and the digital reference copies will also exist in multiple instances of computer back-up. Last, due to pending litigation, the official version of the contract may be under a legal hold. Thus, at precisely the same instant, the same information (the executed contract) exists in at least four contemporaneous states: it has official business record status, it is being used as reference, it exists as back-up data, and it is preserved under a legal hold.

So, who cares? Companies should care, and indeed must care, because in these four states, different and sometimes conflicting requirements govern how the information is maintained, how long it must be kept, and whether and how it is protected and secured.

Severe consequences can arise when a company misunderstands which requirements apply to its information in a particular circumstance or state. A legal hold notice that instructs employees to identify and keep records may fail to preserve relevant non-record information, exposing the company to sanctions. Back-up data kept for the retention period applicable to the record-quality active data, rather than for the brief time period necessary for disaster recovery purposes, will accumulate in astounding volumes, causing unnecessary business expense. And the same back-up data may yield explosive litigation costs as the parties sift through mountains of data that, because unnecessarily kept, might now be subject to a preservation duty.

The confusion is understandable, because even experts muddle these concepts. Vendors of disaster recovery back-up systems encourage their use for records retention archival storage. Legislatures and regulatory bodies create laws that commingle the language of records retention and preservation. For example, the Federal Regulatory Energy Commission entitled its records retention regulations for power utilities as "*Preservation* of Records of Public Utilities and Licenses." 18 C.F.R. Part 125 (emphasis added). And judges frequently refer to "records retention" and "document retention policies" when they instead intend to be discussing preservation of documents, data, and things under a legal hold. Thus, the judicial opinions in *Zubulake v. UBS Warburg*, the preeminent case regarding digital discovery and the preservation duty, use "preserve" and "retain" interchangeably. See *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.").

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A review of the different information states and their divergent requirements:

OFFICIAL RECORDS

The company should have a records management policy that defines what is a record and how records will be managed. The company should also have a retention schedule that classifies its records into record series, with associated retention periods and other information. Not all documented information in the possession, custody, or control of the company should have record status. Instead, only documented information regarding the operation of the company's business that it is legally required to keep or which has legal compliance or business value should be a record.

Record-quality information should be retained in the ordinary course of business pursuant to the retention schedule, regardless of the medium of the record (such as paper, digital data, or micrographics). Retention periods should be determined based upon legal requirements and legal considerations (of which there are more than 56,000 in the statutes and published regulations of the United States federal system and the fifty states), and also by considering the business value and business need for the information. Legal compliance and business considerations may also dictate the manner in which the records are retained, including how they are protected and secured. And once, in the ordinary course of business, a record has been retained for the length of time that the retention schedule indicates, it should properly be disposed of because its compliance and business value has expired.

REFERENCE COPIES, CONVENIENCE

COPIES, AND NON-RECORD INFORMATION

When individuals at the company have duplicate versions of official records for day-to-day reference or convenience, such versions may not be classified as company records. Thus, the company is generally not obligated to retain them at all, and they need not be kept for the length of time indicated in the company records retention schedule. But the opposite is not the case — reference and convenience copies should be disposed of by the time the retention period applicable to their official record-quality versions has expired. The company has made a thoughtful decision regarding how long the information should be kept in the ordinary course of business, based upon legal compliance and business need, and if uncontrolled reference and convenient copies are kept longer, this purpose is frustrated. Also, the sheer weight of the accumulated volume of inappropriately maintained reference and convenience copies will be a detriment to the company's operations, and should therefore be avoided. By analogy, a single snowflake is practically weightless, but several feet of snow can cause roofs to collapse.

For this reason, reference and convenience copies should be treated similarly to other, non-record information at the company. They may have passing value to individuals or groups, but they should not be kept for an inordinate period of time.

BACK-UP

Companies routinely and systematically replicate active digital data and place the copied data in back-up disk storage or back-up media, such as magnetic tape. Some companies occasionally use this technology for archival storage of record-quality data. While this can be convenient at the outset, most destinations of back-up data are highly inconvenient for later retrieval, such as magnetic tape that houses compressed back-up data.

The predominant, appropriate reason for back-up is to provide for disaster recovery restoration, allowing access to the information if its active network version is lost or compromised due to a disaster.

Because the back-up version of the record-quality active data is not itself the official record, the back-up data need not be kept for the applicable records retention period. In fact, disaster recovery back-up data should only be kept for the relatively brief period of time necessary to serve its sole, legitimate purpose, which is disaster recovery restoration.

INFORMATION UNDER LEGAL HOLD

When litigation is pending or reasonably and clearly impending, a preservation duty arises that requires the parties to identify, locate, and preserve documents, data, and things relevant to the matter. The scope of the preservation duty is determined, both topically and temporally, from the claims, defenses, issues, and events at dispute in the matter. The preservation duty may arise from statutes or regulations, from rules of procedure, and from the inherent power of the court.

The preservation duty applies regardless of whether the relevant information is classified as a record, for the duty is focused upon whatever relevant information is in the possession, custody, or control of the company.

Within its scope, the preservation duty supersedes the company's retention schedule for record-quality information and the company's policies and practices regarding disposal of reference and convenience copies of records and other non-record information. The preservation duty may or may not require a company to interrupt ordinary course of business back-up rotations, depending upon the circumstances in the case and the company's treatment and use of the back-up data.

KEEPING THE STATES STRAIGHT

To avoid confusion, companies must be diligent in recognizing the various states in which their documented information exists, so that the applicable requirements can be identified. Companies must also be forceful and consistent in the language they use to describe these states:

- When documented information fits the company's records management policy definition and the retention schedule's classifications, it is a **record** which is retained in the ordinary course of business pursuant to a **retention schedule**.
- Reference copies, convenience copies, and non-record information are **kept** or **maintained**, not retained.
- Disaster recovery back-up data on disk or tape are **kept** or **maintained**, not retained.

- Documents, data, and things subject to a preservation duty (regardless of whether they are records) are **preserved** under a **legal hold**, not retained under a document retention policy.

Companies with the discipline to use the right language will be rewarded, for they will enjoy more success in complying with the contemporaneous, contradictory requirements that apply to the same information in different states. ■

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