TEXAS LAWYER
www.texaslawyer.com
JANUARY 31, 2011 VOL. 26 • NO. 44 An ALM Publication

HANDLE E-DISCOVERY ISSUES EASILY

by DANIEL R. SMITH

Electronic discovery has created new traps and pitfalls in document production. But, armed with some best practices on handling electronic records, litigators can proceed with confidence.

The electronic documents sought in discovery often are stored on multiple computers and hard drives across the country; they sometimes are stored in different formats, which may not be compatible. As with any other records, parties have a duty to preserve electronically stored information (ESI). The duty to preserve arises when a party knows or should have known that the evidence is relevant to current or future litigation. Fulfilling this duty can be exceedingly challenging, considering the potentially enormous volume and numerous sources of ESI.

Naturally, this raises serious electronic record preservation concerns. Lost or destroyed ESI can have serious consequences for a client. It can lead to allegations of spoliation, for which a range of sanctions can apply.

The most severe is the death penalty: entry of default judgment or striking of pleadings or defenses. A judge may issue it in the most egregious of cases, such as when a party has engaged in perjury; tampering with evidence; or intentionally destroying evidence by burning, shredding or wiping out computer hard drives.

A slightly less severe, yet highly dangerous, sanction is an adverse-inference instruction: The court instructs jurors that the lost evidence is relevant and favorable to the innocent party. Courts may also issue monetary sanctions or allow more discovery as a way of emphasizing that discovery misconduct is unacceptable.

Take Five

When the duty to preserve is triggered, a litigator must do a number of things to ensure that the client protects relevant ESI and that the ESI remains available for production. Here are five best-practices tips on how to handle electronic records in a litigation context.

1. *Determine the universe of electronic records that may be relevant to the litigation.* Map the client's computer network, including servers, to figure out which computers would have relevant information stored on them. Don't know what mapping is? It's time to call in some technical assistance.

Also, find out which users might have relevant information stored on portable devices, like a thumb drive or cell phone. This likely will extend to relevant information forwarded from a company computer to an employee's personal computer or personal e-mail accounts. Locate the electronic records so that they may be secured.

2. *Send out a litigation-hold letter to everyone who may have possession of or access to relevant electronically stored information.* The letter should identify the duty to preserve the electronic records and define the scope of the documents to be preserved as broadly as reasonably possible.

The letter should clearly order the documents to be secured and protected from deletion, destruction, or alteration. It should emphasize the duty to preserve e-mails and their attachments in native form.

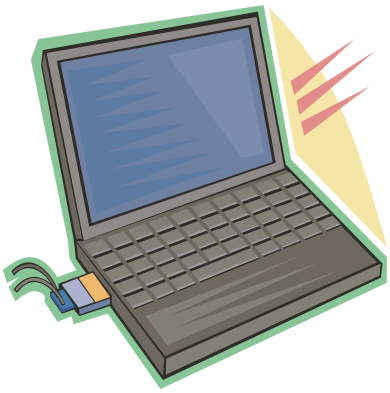
Simply printing out the documents is insufficient. The printout will not include metadata and other potentially valuable electronically generated information that the native format of the document might provide. Send periodic reminders of the duty to preserve. Track sent notices so there is a complete and defensible audit trail.

3. *Disable any electronic information system that automatically may delete or destroy electronic records.* Clients sometimes put these systems in place to conserve storage space on computer servers by identifying electronic files of a certain age and automatically purging them. Once purged, the electronic information can be lost forever.

Federal Rule of Civil Procedure 37(e) provides a safe harbor for lost electronic records caused by the routine, good-faith operation of an electronic information system. However, a party cannot exploit this exception to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that is required to be preserved.

4. *Determine what kind of computer and e-mail systems*

are in place. A litigator must understand which file formats are at issue and what the client's data storage practices and policies are. This requires identifying the types of operating systems on which the computers run and the software installed on the computers. It further requires identifying which e-mail system the client uses and how the client stores e-mail attachments. This will facilitate planning for future production and review of the electronic records.



5. *Seriously consider hiring an independent, third-party litigation support company to help.* These professionals can take the process from start to finish and provide a layer of independence and separation between the client and counsel that bolsters the client's credibility on matters concerning document production. Moreover, they can help establish the protocol for locating, harvesting and producing electronic records, as well as track each action that has been taken in that effort.

This is helpful when a discovery dispute arises, especially when another party argues that electronic records exist but have not been produced. Also, the sheer volume of ESI may be too much for the client to handle alone. A professional, litigation support vendor could help manage the yield and navigate through any obstacles that the e-discovery process may present. TNL

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