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E-Discovery Lessons Not Just For Litigators

Companies must craft policies for record keeping, destruction

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Living in a largely digital world, it is not clear just when modern society lost the distinction between the transitory and the permanent when it comes to communication.

It is clear though that the once bright light between a phone call and a communication of record, such as a letter, for example, has been lost. The digital age has allowed virtually every type of communication from telephone calls to e-mails to correspondence and documents — along with a great deal of other types of data — to be preserved virtually indefinitely, whether significant or not. For the past several years, electronic storage has been so inexpensive that most individuals and many companies have just kept everything. Consider how much easier it would be, not to mention less costly in the long run, if we could somehow find a way back to the operating assumption that only necessary information should be kept and only for as long as is necessary.

Unfortunately, as litigators have learned over the past couple of years, the error of our ways is only now coming to light because once a dispute arises, they have to order clients to preserve a veritable ocean of electronically stored information (ESI) in addition to whatever paper documents exist. While this may be simple to say, it can be hard to do, as clients have to track down and, for the first time in some situations, really learn what information has been kept and by whom.

With the revisions to the Federal Rules of Civil Procedure in late 2006 and the court cases that have been decided since, litigators are now routinely advising their clients and opposing parties that a "litigation hold" must be instituted when a party reasonably anticipates that litigation will ensue. The failure to preserve this data can lead to and — in some cases — has led to sanctions against both clients and lawyers.

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Consider, for example, the hard drive of a departed employee's work computer. In the past, IT personnel would have thought nothing of reformatting it and reusing it. Now, at the risk of having a court impose an adverse inference against the organization in some litigation for failure to preserve information, even such a simple and routine procedure must be carefully considered.

Art Form

Data preservation, however, is only the tip of the iceberg. Because so much of the relevant information may exist only in e-mails or other ESI that have not been meticulously labeled and filed, the only way to find relevant information is to search for it. This means electronic searching using keywords. Finding the relevant key words and refining searches so that the relevant information — but not tons of irrelevant information — is identified is an art form unto itself. This is where IT professionals become of great assistance to the process. Yet, once the potentially relevant information is located, the data must be reviewed by someone, and usually that means a lawyer, for relevance and privilege. Because only relevant information should be produced to the other party, and privileged information must be identified and listed on a privilege log, the review and ultimate production phases for ESI can also constitute cumbersome and extremely expensive steps.

Litigators have been on the front line of this battle up to now because of the revisions to the Federal Rules to adapt traditional discovery procedures to the digital age. Changes in the state rules and in procedural rules for administrative agencies, such as the Freedom of Information Commission, will not be far behind. And while litigators are destined to have to continue to deal with these issues for at least the next several years, the real long-term solution for clients is to find a way to reduce the volume of irrelevant information and manage the relevant information in a more effective manner. This is a process that will require a collaboration among clients, liti-

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Clients and their lawyers should begin now to craft policies and procedures that restore discipline to record-keeping and record-destruction practices. The touchstone for these policies and procedures should be to enable the client to retain in an organized manner the information that is necessary and required for the enterprise, but to destroy, as part of routine business practices, information that is generated that no longer has a business purpose because retaining this information only makes the necessary and relevant information harder to locate and use.

Starting Point

The process of developing useful policies and procedures, however, is also not simple. A good starting point is to determine what kind of information is kept, when is it kept, by whom, and where. There are many reasons to be concerned, for example, if employees routinely keep organizational information on home computers or zip drives or if employees duplicate sensitive company information, including e-mails and attachments, onto their personal laptops for their convenience when traveling or out of the office.

In addition, a good process must include securing buy in and participation from senior leadership in the organization; being mindful of the current culture of the organization; and including a study of what information the law requires the organization keep. All of this should be integrated with participation from the IT department, because the type of systems and software the organization uses will affect the policies, their capabilities, and their implementation.

A final consideration, but an extremely important one, is the need for discipline in the information retention and destruction system. If an entity is going to have a system, it should be adhered to. As lawyers, we all have learned along the way that it may be better not to have a policy than to have one and not follow it. Discipline can be hard to implement, however, as it may involve a range of actions from limiting how e-mail is used to imposing system limits on how much information a person can retain or where it must be electronically filed to requiring ongoing employee training for the system. Periodically reexamining the policy is also important to make sure that it is functioning as intended. Clients that have gone through the e-discovery process know that the sometimes costly lessons of e-discovery are not just for litigators. The lessons learned should help both lawyers and clients develop everyday business practices for record retention and destruction that enable clients to comply with the law without breaking the bank. ■