

## Electronic Discovery &amp; Records Management

## TIP OF THE MONTH



March 31, 2009

Preservation of Dynamic or Transitory Systems

**Scenario:**

A manufacturing company is sued by a class of consumers each of whom alleges to have suffered damage from a manufactured item. Information about the research and development, marketing and sales of this manufactured item is kept on a number of relational databases maintained by the company. The company wants to comply with its preservation obligations but is not sure how to preserve constantly changing databases without taking them out of service.

***Issues Presented in the Preservation of Data on Dynamic or Transitory Systems***

Organizations may have systems containing data that is updated or changed over time (e.g., customer or sales information, financial data, research and development information, memoranda that are revised over time). When litigation implicating this dynamic data arises, an organization faces some interesting challenges, including whether it is sufficient to preserve the data as it exists at the time that the preservation obligation commences, or whether the organization will be required to preserve incremental changes in the data over the course of the litigation.

If the organization routinely saves successive drafts of a document, or periodically records the data contained in a system (e.g., monthly or quarterly), then it may be relatively easy for the organization to comply with its obligations when litigation arises. However, if such information is *not* preserved as a matter of course, other considerations come into play. Given that no organization is required to maintain every scrap of paper generated, the burden and cost of preserving data on dynamic systems (which may be updated hundreds or thousands of times each day) will need to be weighed against the potential liability presented by the specific facts and claims underlying each dispute. Additionally, dynamic systems typically have not been developed with preservation in mind, and, as such, there may be unique challenges presented in seeking to preserve such data.

***Steps Towards Identifying Dynamic or Transitory Systems***

As with many issues concerning the preservation of electronically stored information, there is no substitute for pre-litigation preparation. Thus, as a best practice, organizations that maintain dynamic data should become familiar with their systems in advance of any litigation or other dispute. Steps to consider, as appropriate to the circumstances, include:

- Developing a comprehensive understanding of any dynamic or transitory systems, particularly those that are most often relevant to litigation, governmental investigations, and third-party requests. This might involve discussions with IT personnel and area managers as well as a review of

the kind of data contained on these systems.

- Documenting the information about the dynamic or transitory systems in order to ensure consistency across various litigations or other requests and to create institutional memory should personnel change.
- Taking steps to be sure that in-house and outside counsel understand the burden both to the operation of the business and from a pure cost perspective of preserving (and producing) such dynamic data.
- Developing and following guidelines that specifically address the preservation of dynamic or transitory systems. This guidance may include a discussion of whether “snapshots” of the data can be created, and under what conditions the organization might agree to create such snapshots. Other preservation alternatives may include maintaining logs of all changes to the database and avoiding system or other changes that might result in the loss of data.
- Creating a plan that so that the appropriate personnel associated with the dynamic or transitory systems are copied on any litigation hold notice. This plan could include checks to verify that any periodic “snapshots” are being taken.

### ***Discuss Dynamic or Transitory Data with Opposing Counsel***

One possible method to reduce the risks associated with the preservation of dynamic data (the most significant of which is the potential for allegations of spoliation) is to approach the opposing party at an early stage to seek agreement on the nature and extent of the data to be preserved. Where appropriate, such early engagement may provide an opportunity to discuss: (i) any unique preservation issues presented by dynamic data; (ii) any technical complexities of the databases themselves; (iii) the extent to which the information contained on these databases is equally available from other sources; (iv) possible, less burdensome alternatives; and (v) to get a feel for the type and volume of information sought by the requesting party.

Considering that, by nature, dynamic data is subject to frequent, if not constant, change, it is imperative that any objection to preservation be registered with an opposing party as soon as practicable and, in some cases, even before a request for production has been made. Again, this pro-active approach will help to support the argument that the organization was forthright and fully complied with its preservation obligations.

### ***Develop Standard Disclosure Statements Regarding Dynamic or Transitory Data***

To further avoid any suggestion that potentially relevant information was not preserved, and to ensure consistency across litigations, an organization should consider developing standard descriptions of its dynamic data. These descriptions will aid in responding to document or other requests. Further, although the data itself is subject to frequent change, an understanding of the processes associated with developing the data will be invaluable when talking to fact witnesses and, in some cases, in developing arguments and defenses to the claims asserted in the litigation.

Following these steps is part of a comprehensive approach to the preservation of data from dynamic or transitory systems that will help to reduce the risks and costs of litigation and place an organization in the best position to defend itself.

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