January 2011

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Electronic Discovery & Records Management

Tip of the Month

Reducing the Costs of E-Discovery: Preservation and Proportionality

Scenario

An organization is named as a defendant in a large-scale antitrust class action filed in federal court. The organization's legal department immediately issues a broad preservation notice to personnel in nearly all of its domestic offices, suspends its email auto-delete function, issues preservation requests to its foreign affiliates and begins to consider extraordinary preservation efforts. One week later, the same organization is served with a complaint in a discrete employment matter involving the alleged wrongful termination of one of its sales associates. The organization, concerned about ensuring that it does not run afoul of its preservation obligations, contemplates whether its preservation plan for the employment action must be the same as that of the antitrust action.

The Organizational Costs of Preservation

The costs and burdens associated with the preservation and production of electronically stored information (ESI) can be significant. Commentators have remarked that many lawyers, as well as institutional, organizational, and governmental litigants, view preservation as one of the greatest contributors to the disproportionate costs of litigation in cases involving ESI. An organization issuing a widespread preservation notice may potentially face expenses associated with pulling backup tapes from rotation, imaging hard drives, searching for relevant data and suspending data retention policies, accompanied by the costs of processing, reviewing and producing large volumes of data.

But it is not simply the preservation or production of ESI relevant to one litigation that is cause for concern. Often overlooked are the long-term costs of cumulative preservation. Preservation of ESI in one matter can create a pool of discoverable data that must be considered for continued preservation and production in all subsequent legal actions. While this may, to some extent, be unavoidable, overbroad preservation efforts taken by organizations concerned about the uncertain legal landscape and the risk of sanctions compound the problem. For example, when an organization chooses to pull backup tapes from rotation as part of its preservation plan for one matter, those backup tapes must be replaced, stored, organized and managed, *and* they become

a potential data source for every subsequent legal action.

Over time, the accumulation of data not otherwise needed for normal business operations, coupled with the regular influx of new legal matters (and new legal holds), makes disposing of *any* data increasingly difficult. Additionally, the costs associated with the increasing volume of preserved data—including managing and maintaining the systems that are required to properly house and organize the data, as well as effectively search for, process, review and produce the data for each legal action—can be prohibitive.

Proportionality and Preservation

As some courts have observed, there is a distinct lack of consensus regarding the standards that should govern preservation and spoliation. That uncertainty has led many organizations to opt for expansive preservation efforts, regardless of the proportionality principles set forth in Rule 26(b) of the Federal Rules of Civil Procedure. Rule 26(b) identifies certain factors that may be considered in balancing the burdens of discovery against its likely benefits, including the risks presented by the legal action, the needs of the case, the amount in controversy, the organization's resources, the importance of the issues at stake, the importance of the potential discovery to resolving the issues, and whether the discovery sought is cumulative or duplicative or can be obtained from a more convenient, less burdensome or less expensive source. And while just about every litigant knows that relevant information must be preserved in the face of reasonably anticipated litigation, and that production may be limited by the concept of proportionality, less known is that some courts have recently shown explicit support for applying the concept of proportionality to preservation. These courts note that the concept of proportionality in preservation has been overlooked, or at least not articulated, in prior court decisions. In fact, at least one court has opined that a non-proportional approach seems out of step with Rule 26(b), which the court reads as cautioning that *all* permissible discovery must be measured against the yardstick of proportionality.

But beyond the recent case law, an organization should approach its preservation obligations with the same business and common sense approach applied to other legal decisions. What are the risks and issues at stake in the litigation? Who and what are the actual sources of responsive information? Do backup tapes really have information that is reasonably likely to be responsive *and* that is not available from another source? Is there a less expensive or burdensome way than imaging to preserve data on hard drives? A knee-jerk reaction that employs extraordinary preservation measures in every legal action may create more costs and burdens than benefits.

Best Practices: Develop a Flexible Preservation Plan

- *Understand the organizational costs of preservation and your options*. Know your company's data sources and the costs associated with preservation. Assessing the proper preservation method for a particular data source or legal action, and defending the method chosen, requires an understanding of how the organization's systems operate, what information is maintained by those systems, the options available for preservation or collection of data from each source and the costs associated with those options.
- *Consider developing a preservation policy which acknowledges that an appropriate*

preservation plan may depend on the circumstances of each legal matter. All legal actions are not created equal. The preservation measures required are likely to vary depending on the scope of the claims, the legal and factual issues involved and the risks presented. A rigid preservation plan that demands a uniform response to all legal actions is likely to result in over or under preserving at some point. Consider working a degree of flexibility into your preservation policy so that you can appropriately address each legal action.

- *Think about negotiating preservation limits with opposing counsel*. Negotiating the scope of each party's preservation efforts, if possible, may help to avoid protracted and costly motion practice as discovery progresses. If an agreement cannot be reached between the parties, it may still be useful to advise opposing counsel of the steps taken to preserve relevant data sources. This puts the burden on your adversary to object to your selected measures and explain why those measures are insufficient. Keep in mind that Rule 26(f) instructs parties to discuss any issues about preserving discoverable information during the meet and confer.
- *Consider developing policies and procedures that provide for the timely and effective lifting of legal holds.* Preservation obligations do not continue indefinitely, and a failure to timely lift legal holds may compound the costs and risks associated with preservation. Consider developing policies and procedures that allow for the timely and effective lifting of legal holds where possible and make sure those policies and procedures are enforced.

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