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## Be prepared for the burden of digital legal discovery

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**T**he electronic age has enabled huge advances in the ability of companies to gather and apply knowledge to improve performance.

Unfortunately, there is a side effect that arises when companies are threatened with litigation: the burden of electronic discovery.

One of the leading legal issues facing businesses, electronic discovery is now sought by both sides in nearly all business litigation. Yet few businesses are ready to comply effectively, despite the potential of harsh sanc-

tions for failure to do so.

A duty to preserve all relevant information arises when litigation is reasonably anticipated, which may be triggered by something as seemingly mundane as an employee complaint to a supervisor. In the past, preservation largely meant compiling relevant papers. Today information can be in diverse, and sometimes unanticipated, locations, such as scanners, printers, telephones, PDAs, content from discontinued Web sites and jump drives.

Some discoverable information is invisible to the average user. Many documents contain metadata recording details of users and the comments and changes they make. Even deleted information is discoverable: pressing "delete" generally does not destroy data, it just makes it unseen and harder to recover. Other information is difficult to retrieve because of business decisions. E-mail systems frequently do not lend themselves to searching and identifying old e-mails, making retrieval complex, expensive and time-consuming.

Electronic files should not simply be opened and reviewed to determine relevance: merely accessing a file potentially destroys metadata and hence information

covered by the duty to preserve. Data should be duplicated and analyzed in a manner that supports legal confidence that no loss or change to content occurred after the duty to preserve arose.

Courts are intolerant of incomplete, inaccurate or dilatory responses to recovery requests: ignorance is not excused. Judges often grant requests for sanctions for delay, non-production and erroneous claims of non-existence. In addition to fines calculated to impose real financial pain, sanctions can change the outcome of a dispute, by excluding witnesses or pleadings, dismissal and default judgments.

The best advice is to prepare in advance, before any threat of litigation arises. Seek advice from a lawyer who has an understanding of electronic discovery and the particular issues it raises.

One of the first steps should be information retention/destruction planning to address where data is stored and the commercial lifespan of different types of information. Information destroyed under a documented and enforced retention policy prior to notice of litigation is not covered by the duty to preserve.

To minimize the number of records

that have to be searched, consider restricting the use of desktop and other storage locations if you have a central server. It can help to establish a policy assigning document retention responsibility, perhaps to the original author exclusively and to have information technology (IT) personnel permanently scrub deleted and temporary files over a specified age. Properly enforced, such techniques dramatically reduce the number of documents to be preserved, reviewed and potentially discovered.

Once litigation is anticipated, destruction policies must be suspended with respect to relevant information in existence at the time the preservation duty commenced. A duty to preserve extends to all possibly relevant information, and thus all activity that could alter such information should cease. Of course, suspending key applications and hardware can significantly disrupt business operations.

The best protection is undoubtedly advance knowledge of the people likely to be involved and the location of information related to the issue, especially if the means of preserving different types of information has already been determined.

Electronic discovery can have very serious implications for the unprepared. Advance planning is by far the best way to minimize risk and cost. If legal action is already anticipated, any delay may be fatal to the ability to present your case fully in court.

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