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eDiscovery: Everything You Need to Know About Records Management, Identification, and Preservation — Part 2 of 2

By Bruce A. Olson

INTRODUCTION

In the first part of this article, I focused on the first step in George Socha and Tom Gelbmann's landmark [Electronic Discovery Reference Model \(EDRM\)](#): Information or Records Management. In this article, I'll discuss the Identification and Preservation phases.

IDENTIFICATION

Players, Places, and Time Frames

Once the actual process of preserving ESI begins, you need to approach the task with a proper plan. Obviously, you need to identify who may have created ESI relevant to the matter, where it is stored, and the applicable time frames related to the dispute, so you can define your universe of relevant information. You also need a complete survey of the IT infrastructure. A useful practice is to develop a "Client ESI Survey" that can instantly be delivered to a client to begin the process of collecting the necessary information so you can develop and implement a litigation hold. Such a survey might include sections on:

- An explanation of the eDiscovery process, its scope in a particular case, and a definition of ESI.
- A listing of possible sources for electronic evidence.
- Identification of Key IT personnel.
- A network infrastructure questionnaire.
- A server information form.

- A desktop/laptop information form.
- A software questionnaire.
- An electronic communications questionnaire that covers email, instant messages, etc.
- A backup systems questionnaire.
- An Internet access and usage questionnaire.
- A remote home user questionnaire.

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In my practice this client survey serves a dual purpose. I've developed a series of interactive PDF forms that I bundle and send to the client for completion at the outset of every matter. I've also taken the same basic forms and created a more generic marketing package. I provide the forms to clients not yet involved in litigation so they can understand what information may become relevant. They can use the forms to assemble pertinent information to create a centralized repository of information. The complexity of the survey also suggests to clients that they should confer with me in advance to develop proper document retention/destruction policies, eDiscovery preparedness plans, and audits of records management practices to vet them in advance of any actual dispute.

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Case law suggests attorneys must meet with their clients, the key players, and the knowledgeable IT personnel in person to familiarize themselves with the information identified above to begin the process of implementing a litigation hold. Attorneys are expected to have personal knowledge and skill in this area, or bring in persons to help who have the knowledge. They cannot simply rely on the client or the client's IT department to handle things on their own. Use of a Client ESI Survey can help as an organizational tool to help everyone develop the knowledge needed to establish a litigation hold and move on to the development of a case specific eDiscovery preservation and production plan.

The litigation hold document should identify all documents and data relevant to the litigation and include instructions on preservation.

Litigation Holds

Once the information identified above has been assembled and the proper persons have participated in an appropriate meeting, a written litigation hold must be developed. The attorney should provide this document to the client for distribution to all affected persons. The attorney must take steps to ensure it is distributed widely enough, see to it that it is periodically reissued, and make personal enquiry to assure ongoing compliance.

The litigation hold document should identify all documents and data relevant to the litigation and include instructions on preservation. It should include instructions to suspend any document destruction practices until further notice. It should indicate any system generated automatic deletion features should be stopped. It should warn against defragging or otherwise

altering the hard drives of any computers or storage devices that may contain relevant ESI. It should include a warning to employees not to go searching through old files or emails until such time as steps have been taken to ensure no inadvertent modification of metadata will occur.

There may be other cautions that are appropriate depending on the circumstances, and it is the lawyer's job to make sure the instructions are as complete and detailed as necessary, and are delivered in such a way that an average person will understand them.

Finally, the litigation hold should contain a warning of the possible consequences for non-compliance.

Litigation Response Plan

Once the litigation hold has been issued it's time to shift to the creation of a plan for responding to ESI preservation and production obligations, while minimizing operational disruptions and avoiding the waste of large sums of money. It is actually useful for a company to have a generalized response plan in place as a corollary to its document retention policy, that can be quickly fine-tuned to meet the needs of a particular case. The plan should be developed with input from key company individuals, general counsel, outside counsel, internal IT and any external IT advisors, records management, human resources, and, where appropriate, outside electronic discovery consultants. Such a plan should include consideration of the following:

- Collection and documentation of all existing document management plans.
- A complete survey of the IT infrastructure.
- Development of methodologies for accessing, reviewing, and producing ESI.
- Document all preservation plans such as preservation of backup tapes, email archives, suspension of normal records retention plans, etc.

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- Develop written instructions to identify who is responsible for what in responding to requests for ESI.
- Creation of an identified ESI response team.
- The need for outside consultants and the process for determining what type of experts may be needed and the creation of an appropriate RFP to assist in their retention.
- Creation of a plan to negotiate preservation and production obligations with the other side in such a way as to hasten the time when the litigation hold can be lifted.
- Prompt determination of the need, if any, for forensic analysis.

PRESERVATION

Once the identification process has resulted in the implementation of the litigation hold, it's also time to move to the preservation stage to avoid the risk of inadvertent spoliation of ESI. It can be extremely burdensome and costly to preserve potentially relevant information for an extended period of time. That is why the eDiscovery amendments to the FRCP call for the early development of a preservation and production plan as part of the normal Rule 26 meet and confer obligations.

In fact, many attorneys find it useful to have a specific eDiscovery conference with opposing counsel much sooner than the mandated 21 days prior to the Rule 16(b) scheduling conference simply to address these issues. In some cases local rules require such a conference, and in many more cases various US District Courts have developed protocols to assist counsel in developing an appropriate plan. The expectation is that parties will work things out themselves, and that motion practice in this area should be limited wherever possible.

At such conferences parties should be prepared to disclose information about their ESI and their plans for obtaining ESI from the other side. The process is supposed to be collab-

orative. Attorneys should consider bringing client representatives to the meet and confer with specific IT knowledge, and in appropriate cases they may wish to bring knowledgeable eDiscovery or computer forensic consultants to do the heavy lifting. The goal should be to develop an agreed upon, cost-effective plan for both sides that is appropriate for the issues in the case and the amount of money at issue.

It is often useful to issue preservation letters to the other side at the outset of litigation to advise them of their need to preserve ESI. Boilerplate letters are less useful than ones that specifically identify the types of information that should be preserved based on their relevancy to the given case. These letters are intended to educate the recipients about the type of ESI that may exist and the importance of preserving it properly until it can be collected. They are also intended to put the recipient on notice to suspend routine document destruction policies.

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The preservation letter may serve as an early invitation to start the process of negotiation that will ultimately need to take place as part of the meet and confer. The key is to be sufficiently specific to the facts of a given case that you are putting the other side on notice, while at the same time not being so generalized or heavy handed that it is seen as an abusive litigation tactic.

CONCLUSION

To properly represent clients that use computers and electronic means of communication

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in their day to day operations, attorneys who in the past didn't really need to know much about discovery, now need to know how to advise their clients about eDiscovery long before they are served with a summons and complaint. Proper eDiscovery preparedness should be part of the planning of any entity that is likely to be involved in litigation. It requires technically knowledgeable attorneys to take the lead, and the recognition by other attorneys that if they lack such knowledge they should bring in appropriate help. Collaborative efforts with your clients, and with the other side are very important.

eDiscovery has added a new, complex and expensive layer to the litigation process. Knowing what you need to know, and planning how to deal with it effectively, can help minimize the associated pain and expense.

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