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## Keeping the Genie Contained: Eight Tips to Avoid Spoliation in Electronic Discovery

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It's here; it's there; it's everywhere—electronically stored information (ESI)—that is, and the complexities related to the way in which both organizations and individuals generate, receive, store, manage, share, and access it are profound.

Corporate legal teams struggle to navigate this unfamiliar territory, even as electronic information—with a never-ending appetite for additional storage space—continues to accrue at a rapid rate. Attorneys, information management (IT) personnel, and records information management

(RIM) professionals need to think strategically to gain and maintain control over the exponential growth potential of such internal data environments. If meaningful interdepartmental communication regarding retention policies and preservation obligations is lacking, the results can include inadvertent spoliation of relevant information in litigation, leaving the organization open to attack by opposing parties and to potentially serious consequences.

Likewise, the complexities impact individual litigants. Today, average citizens in the United

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States have more computing power available to them personally than NASA had in the 1960s. Individuals and families in the United States generate and accumulate astonishing amounts of ESI through mobile devices, home computers, appliances, cloud computing services, social media platforms, cars, and video game consoles. When faced with the unknown nature of the legal process, individuals often do not know intuitively what they must do to preserve relevant electronic evidence.

In the end, courts have wide discretion to impose sanctions for even unintentional spoliation, which may range from monetary sanctions such as attorney fees and costs, to limitations on the use of certain evidence at trial, to, in rare cases, jury instructions that include an adverse inference. The following eight tips are intended to assist counsel in reducing the risk of spoliation challenges for individuals and clients.

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## **I. Be Familiar with Internal Data Storage and Management**

The vast amount of data held at any one time by even the smallest company can be overwhelming. Counsel must have at least a high-level understanding of pertinent internal information systems, including where and how key information is stored, search and retrieval capabilities, and the process by which information ultimately is purged. A detailed data map, if one exists, can be a useful tool and may be a good place to start. Counsel also should be familiar with an organization's policies and practices governing records management. A general understanding of how long certain types of information are kept in the normal course of business will help equip counsel to construct and execute appropriate preservation plans, ultimately reducing the risk of inadvertent spoliation. Given the heightened need for familiarity with various information management technologies and evolving law related to preservation and spoliation sanctions, prudent counsel may want to partner with attorneys or other professionals who specialize in e-discovery.

Counsel who represent individuals rather than businesses need to make similar inquiries. Is social media involved or likely to be a place where relevant information regarding claims or defenses may exist? How and with what technology does the individual communicate? Is it by text messaging, Tweeting, emailing, Snapchat, or Facebook posts? Again, in

matters where the discovery of relevant ESI may be important, counsel may find it prudent to partner with attorneys or other professionals who specialize in e-discovery.

## **2. Collaborate with IT and Records Information Management Teams**

Effective communication between counsel and IT and RIM professionals can mean the difference between appropriate preservation and the spoliation of relevant business information. IT and RIM professionals likely are best positioned to take specific actions to preserve relevant information that would otherwise be routinely deleted or modified through automated deletion processes or pursuant to internal records management schedules. Consider including the appropriate individuals from IT and RIM on case-management teams so that they can be a part of discussions relating to scope determinations, custodian lists, and relevant noncustodian data sources.

IT and RIM professionals must have a good understanding of the organization's records management policies so they can ensure consistent implementation. One of the most common preservation pitfalls occurs as a result of the poor execution of well-planned and defensible records management policies. Counsel should confirm that policies are being executed consistently and implement documentation requirements, if appropriate. Taking these steps will help avoid the dilemma that occurs when a written policy indicates certain information should exist on the organization's servers but in practice, perhaps because of a concern over storage space, the information was purged ahead of schedule. Without good communication, IT professionals may not understand the importance of their compliance with records management policies and schedules and may make independent judgments about whether certain information is important to company operations. For all of these reasons, it is important to establish and maintain open lines of communication with IT and RIM professionals, even in the absence of significant litigation.

## **3. Initiate Early Discussions with Opposing Parties**

The ESI explosion has created an urgent need for proportional discovery. Attorneys have a responsibility to demand that discovery be proportional to the scope and nature of the case. The tremendous amount of *potentially* relevant information residing within an organization's electronic infrastructure can make a case cost-prohibitive even before the first deposition is noticed. Without reasonable limits, costs related to preservation, collection, review, and production of electronic discovery will

impede parties from resolving disputes fairly in litigation. One way to gain some control in the early stages of a case is to send a “Day One Letter” to opposing parties outlining your reasonable preservation and discovery positions and limits. The letter should communicate counsel’s understanding of the temporal and factual scope of the case and include a list of the types of information the organization is willing to preserve. Counsel should offer to discuss concerns and stress the desire for establishing an agreed-upon ESI protocol early in the case. The letter also can include your expectations of other parties.

If parties can come to an agreement about the types of information that should be preserved early on, the chances of having to defend against a motion for spoliation sanctions later are greatly reduced. If parties cannot agree on the parameters of discovery, it may be wise to solicit early intervention from the court.

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#### **4. Properly and Promptly Communicate with Your Sources**

A legal hold notice is not the only acceptable way to meet preservation obligations, but it is a recognized way to educate its recipients regarding their responsibilities and to document the preservation process. Deciding who should receive a legal hold notice is not as simple as it may seem, especially if the claims are not clearly identified in a triggering communication or complaint. Counsel may want to consider the following questions in order to identify key personnel:

- Were any individuals named in the complaint, demand letter, or other communications?
- Have specific products/services been named in a complaint or demand letter such that relevant key individuals can be identified?
- Have any individuals otherwise been involved in the circumstances that triggered the matter?
- Should the immediate supervisor(s) of key individuals be included?

- Does the temporal scope of the matter impact the custodian list?
- Are contractors, former employees, or others likely to possess unique, relevant information that may be viewed as within the “control” of the party?

In some cases, it may be appropriate to confer with the most relevant and easily identifiable custodians before the legal hold notice is issued so they can help identify other relevant individuals and assist with the initial scope determination. While this can be an important aspect of the process, it should not unreasonably delay the distribution of the initial legal hold notice.

Counsel representing individuals should consider whether legal hold instructions should be documented in the engagement letter or otherwise. Also consider whether appropriate notice should be provided to “friends and family” who may be involved or, importantly, may be seen as having information under the “control” of the individual named as party.

#### **5. Ensure that Preservation Obligations Are Understood**

A legal hold notice (however named) should make it as easy as possible for recipients to understand and comply with their preservation obligations. While there is no “one-size-fits-all” requirement, an effective legal strategy

- Describe the reasons for the legal hold as well as its importance;
- Identify the types of information and subject matter believed to be relevant (*e.g.*, communications with other named parties, marketing documents, research documents, etc.)
- Identify applications or places where relevant information may exist (*e.g.*, text messages, emails, voice-mails, instant messages, word-processing documents, social media content);
- Identify possible locations of relevant information (*e.g.*, mobile devices, laptops, home computers);
- Contain clear instructions about actions employees are expected to take; and
- Provide information about available methods of communicating questions or concerns.

Even after legal hold notices or directives have been issued to individual parties or employees of an

organization, counsel continues to play an active role in the preservation process; this includes providing the appropriate guidance and instructions to custodians as they work to meet preservation obligations.

As a proactive measure, counsel also may want to consider educating the client organization's employees about legal holds. Such efforts can be a useful tool to ensure that employees have a general understanding of what is required of them should they later receive a legal hold notice.

## 6. Consider Reducing the Scope of Preservation

As additional information is obtained about a matter, counsel should consider whether the scope for the matter should be expanded or contracted. If the scope of the legal hold changes, counsel should take appropriate actions to ensure preservation of additional relevant information and release the hold on information that is no longer thought to be relevant to the matter. To that end, it may be appropriate for counsel to issue a revised legal hold notice that identifies the modified scope of the legal hold and describes any changing preservation obligations. Counsel also should consider whether any additional employees, former employees, or nonparties may have relevant information and should act accordingly to ensure those parties receive the appropriate notice or take appropriate preservation actions.

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The scope for a matter also may be narrowed based on information that was collected and preserved for another (possibly similar) matter. For example, if all relevant data has previously been collected and preserved up to a certain date, the temporal scope for the new matter may be narrowed. Previously collected information also may be an alternative data source if relevant information was purged or lost prior to the triggering event.

## 7. Consider Preserving Mobile Device Content

The role that mobile devices play in e-discovery has changed dramatically over the past few years. Mobile

devices are becoming more frequently used tools, used in the ordinary course of business to generate, receive, and store electronic information. Mobile devices also are a significant part of the lives of many individuals who end up as parties in litigation. Consequently, an essential part of the modern-day preservation plan is consideration of mobile devices as a potential source of relevant information.

There are three aspects that are important to the mobile device inquiry. First, counsel will need to understand what the pertinent devices are being used for in order to determine whether they are a likely source of relevant information. This means understanding what applications and communications tools are used to generate, receive, or store potentially relevant information. In some cases this may involve information sources such as voicemails, text messages, or call logs. In other cases, this may include information stored within applications ranging from social networking applications to office productivity software. There also may be cases where these types of information are not relevant or are so marginally relevant that the cost of preservation and discovery is not proportional to the likely benefit.

Second, counsel should assess whether the potentially relevant information associated with the mobile device is likely to be unique and does not exist in another location that is more accessible. There may be easier ways to preserve and collect emails, for example, even if they were generated from or received by a mobile device. In addition, if all of the information in a corporate environment is synced through mobile device management tools to a central location, that could be a more accessible and less burdensome path to preservation. For individuals, perhaps all information is backed up to a cloud location. This analysis may reveal that some unique information is stored locally on the device while other unique information is only accessible via the device but actually is stored elsewhere. This mapping exercise is critical to making effective representations, disclosures, and/or arguments regarding the appropriate approach to mobile device discovery.

Third, counsel should consider what steps might be necessary to ensure preservation of any identified unique information. This evaluation should include consideration of the functionality of the devices—especially features such as auto-deletion or preservation limited by the volume of available storage. Preservation steps may involve actions by the individual party, individual employee, an organization's IT department, and/or preservation requests addressed to service providers. Determining the appropriate combination of preservation actions (when necessary) will depend on the

particular devices and how they are deployed within the organization.

## 8. Consider Preserving Social Media Content

Preservation of social media content is challenging for parties on both sides of the traditional plaintiff-defendant aisle. As with mobile devices, social media preservation is foremost driven by understanding what, if any, social media content actually is pertinent to the matter. Given the challenges related to social media preservation, this is an area that particularly benefits from early negotiations about each party's respective duties with regard to preservation and whether the parties may grant access to social media accounts or agree to retrieve select information from accounts. The need to consider negotiations is heightened, given that whether all social media content is freely discoverable is still an unsettled issue due to the competing privacy concerns.

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The most substantial preservation challenge associated with social media stems from the almost exclusive control that service providers (e.g., Facebook,

Twitter, etc.) have over how social media accounts and content are managed. The ongoing debates over issues of individual privacy and governmental access to social media content have caused service providers to reassess how much information is maintained and for how long. If social media is an important part of a case, the individual or organization should take steps within their control to ensure appropriate preservation. Some social media Web sites may offer tools to assist with preservation, but it also may be necessary to engage a third-party service provider to assist with social media content preservation in appropriate cases.

## Conclusion

Dealing with complex electronic discovery issues is no longer just an issue in select large litigation matters. More and more, electronic discovery problems (and the corresponding potential for allegations of spoliation) arise in matters of all sizes and types. Counsel must play an active role in formulating a reasonable and appropriate approach to electronic discovery that accounts for the needs of the matter and the practical realities of the organization or individual. Effective mechanisms for ensuring appropriate and proportional preservation unquestionably will vary based on the unique characteristics of an individual or organization.

The quick tips set forth in this article address but a few of the myriad potential areas for electronic discovery analysis. They should, however, provide counsel with a view of the evolving landscape to help avoid miscues that could lead to spoliation allegations.