

## **E-discovery – the digital age of litigation**

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In today's world, almost all business information and communications are digital. Consequently, litigation matters of all types increasingly are affected by the demands of electronic discovery.

Electronic discovery is the extension of the discovery process in litigation to include data in electronic format commonly referred to as electronically stored information or ESI. Here we'll cover the basic duties of collecting and preserving electronically stored information and the sanctions involved for failing to preserve ESI.

The duty to preserve ESI - When litigation is or should be reasonably anticipated, your business has a legal duty to preserve relevant evidence. Severe sanctions can arise when a business fails to take reasonable steps to ensure the preservation of relevant evidence, including ESI. In order to avoid these sanctions, it is critical that you understand when the duty to preserve evidence arises.

In general, the duty to preserve evidence is triggered when a potential litigant reasonably anticipates litigation. This standard is an objective one, and asks the question of whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.

The duty to preserve can arise months or even years before a lawsuit is filed or a government investigation is commenced. Frequently, this requires your business to conduct an analysis of whether litigation is probable based upon credible facts and circumstances known at the time.

As a general rule, you should assume that your business has a duty to begin the preservation process at least as of the time your business:

- Receives a demand letter or other communication threatening a lawsuit.
- Becomes aware of an administrative charge - such as an EEOC charge - filed against your business.
- Becomes aware that a lawsuit has been filed or is likely to be filed against your business.
- Begins discussing the possibility of filing suit against another business or person.

We suggest that your business be proactive by creating procedures and policies for identifying and evaluating potential litigation and by documenting your good-faith efforts to preserve information.

Collecting and preserving ESI - There are various technical strategies employed to preserve evidence once litigation is anticipated, and the duty to preserve is triggered. This process is often referred to as implementing a "legal hold" or "litigation hold." Once litigation is anticipated, it is strongly suggested that you contact your legal counsel to assist with the defensible preservation of evidence.

In most situations, your business - with the assistance of counsel - should issue a written "legal hold" notice to employees likely to possess or control relevant evidence, including ESI. This notice should also be sent to IT custodians, including third parties in possession of ESI under your business's control, and others responsible for managing your business's information system. The "legal hold" notice should define what information is to be preserved and how the preservation is to be undertaken.

In addition, a business has a duty to stop the routine deletion of relevant evidence once a duty to preserve is triggered. Failure to issue an effective "legal hold" notice could not only result in severe sanctions but could also result in the loss of the information needed to defend against the claims in the lawsuit.

Overall, the best way to avoid the possibility of spoliation-related sanctions is to be proactive. Even before litigation is anticipated, your business should form a working group on ESI preservation, which should include senior managers from all divisions, internal and/or outside counsel, IT management, as well as representatives from human resources. This working group should be tasked with drafting and implementing a general document and ESI retention policy, as well as with understanding where and how information is stored within the company.

The ultimate goal is to develop policies and procedures providing repeatable and defensible processes for identifying and preserving relevant evidence, including ESI, once a duty to preserve is triggered.

Sanctions for failure to preserve ESI - If a business fails to appropriately preserve relevant evidence - even accidentally - it may be subject to sanctions for so-called "spoliation" of evidence. Sanctions motions increase the cost of litigation and distract from the underlying issues in dispute. Courts have broad discretion to sanction parties for failure to preserve evidence, including:

- Monetary sanctions, such as requiring the spoliating party to pay the other parties' attorneys' fees.
- Granting an "adverse inference" instruction, in which the court informs the jury that it should assume that there would have been damaging evidence had the offending party not spoliated evidence.
- "Case-terminating sanctions," in which a court enters judgment against the spoliating party without addressing the merits of the case.

The level of culpability required to hand out these sanctions varies from one jurisdiction to another. For example, some courts - including the state and federal courts sitting in Virginia - do not require a showing of "bad faith" before issuing sanctions. Even in these

courts, however, the judges have limited the severity of sanctions where the loss of evidence was based on simple negligence.

There is a current proposal to amend the Federal Rules of Civil Procedure to provide uniformity in federal courts. The proposal to amend Rule 37(e) would shield a business's pre-litigation destruction of information from sanctions except where that destruction was "willful or in bad faith and caused substantial prejudice in the litigation" or "irreparably deprived a party of any meaningful opportunity to present a claim or defense."

The varying and uncertain standards only emphasize the importance to document your good-faith efforts to timely preserve relevant evidence. Businesses can substantially reduce or eliminate the risk of sanctions by understanding the duty to preserve evidence, and taking reasonable steps to collect and preserve evidence once the duty to preserve is triggered.

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