

# Planning an Effective Discovery Response

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**W**hether you come to the discovery process as in-house or outside counsel, you can anticipate some of the issues involved in responding to electronic data requests. Consider an example.

Your company is named in multi-state class action litigation. Initially, you must disclose an inventory of corporate computer systems, including all hardware and software, the most likely locations of relevant evidence, backup policies, and your corporate protocol for electronic records management. Your company has operations in several states, with multiple local IT departments responsible for information management.

IT personnel follow recycling schedules for backup tapes. In order to give effect to your duty to preserve evidence, you may need to ensure that IT personnel suspend recycling, at least temporarily. You also need a means of disseminating instructions to all employees to suspend their usual procedures for document destruction to avoid inadvertent loss of discoverable documents.

Once you identify the employees most likely to have relevant information, it will be necessary to segregate those employees' emails from central server backups and to retrieve responsive information from the employees' hard drives without substantially disrupting their work. You also need to determine the extent to which documents reside on employees' home computers, laptops, and palm tops.

Overarching concerns are the need to produce a response without monopolizing the time of your IT staff or other employees, and to allow your team of attorneys to collaborate from different locations in reviewing and producing on tight timelines. You also will need to track which materials have been produced to which parties.

Issues such as these illustrate why pre-review cooperation among in-house counsel, their litigators, and IT personnel is the ideal in successful electronic discovery response. The profusion of electronic information makes pre-litigation planning more important than ever before. Finding and producing information in response to electronic document requests can initially appear to be an enormous undertaking, and a disorganized or untimely response can have disastrous consequences. But with preparation and the right technology, the document review and production process can be easier and more efficient than ever before. Counsel can streamline discovery response, minimize its impact on ongoing business operations, reduce costs of review and production, and gain a strategic advantage in the process. Proper planning among corporate legal and IT departments and outside counsel integrates preparation for discovery in daily operations. When litigation arises, rather than facing a crisis, corporate management and its counsel are ready to respond, leveraging the advantages of electronic discovery.

### **Discoverability of Electronic Documents**

The basic legal framework for electronic discovery is the same as for paper documents. FRCP 34 authorizes requests for production of documents, including "electronic data compilations." FRCP 34(a); *Bills v. Kennecott*, 108 F.R.D. 459, 461 (Utah 1985)("axiomatic" that electronic data is discoverable). Computer records, including those that have been "deleted," are discoverable documents under Rule 34. *Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000).

The rules of discovery have not significantly changed to account for electronic data, but their application to electronic documents raises issues unforeseen in the days of paper storage. Corporations that can expect to receive electronic discovery requests must anticipate the need for ready access to responsive information, while guarding against creating an overwhelming volume of material to be searched.

### **Duty to Investigate and Disclose**

At the commencement of litigation, and before receiving any formal discovery request, a party must disclose to opposing parties certain information, including a description by category and location of documents and data compilations. FRCP 26(a)(1)(B). This requirement means that a party must search available electronic systems for relevant information. *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001). Multiple copies of responsive electronic

information may be stored in hard drives, networks, backup tapes, laptops, floppy disks, employees' home computers, and PDA's. How far does the duty to unearth information extend?

*GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y.), examines the duty to investigate the existence of electronic information. The plaintiffs requested information about Wal-Mart's local sales. In responding, Wal-Mart's attorney relied on a senior executive, who indicated that local sales data was maintained for five weeks only and was no longer available. Wal-Mart claimed that providing the information would be unduly burdensome since it did not have the centralized computer capacity to track the information segregated as requested. A year later, the plaintiffs deposed a Wal-Mart MIS vice president, who testified that in fact Wal-Mart's computers could track the requested information for up to a year. At the time of plaintiffs' request, the local sales information was segregated and available, but because of the delay caused by counsel's misrepresentation, it no longer was. The court chastised counsel for failing to consult MIS personnel:

Whether or not defendant's counsel intentionally misled plaintiffs, counsel's inquiries about defendant's computer capacity were certainly deficient.... As a vice president in Wal-Mart's MIS department, she was an obvious person with whom defendant's counsel should have reviewed the computer capabilities.

*Id.* at 6. The court ordered an on-site inspection of defendant's computer facilities at Wal-Mart's expense. It further imposed upon Wal-Mart all the plaintiffs' expenses and legal fees caused by the inaccurate disclosure, including costs of the cumbersome process plaintiffs had to use to extract the information they sought. This misstep ultimately cost Wal-Mart nearly \$110,000. *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 16244 (S.D.N.Y.).

Client information systems yielded another unpleasant surprise in *Linnen v. A.H. Robins Co., Inc.*, 1999 Mass. Super. LEXIS 240. Plaintiffs' document request for certain emails specifically called for deleted emails available from backup tapes. Defendant Wyeth initially responded, and later confirmed, that it had no backup tapes for a particular time frame. Months later, Wyeth learned that its IT department had in fact preserved over one thousand backup tapes holding potentially responsive information, and that the estimated cost to restore the tapes would exceed \$1 million. Though Wyeth's policy was to recycle backup tapes after three months, these tapes had been set aside during unrelated litigation. As a sanction for its failure to disclose the existence of the tapes, "whether unintended or willful," the court imposed upon Wyeth all costs and fees associated with email discovery. *Id.* at 22.

In addition to initial mandatory disclosures and subsequent responses to specific discovery requests, a further vehicle for discovery of an opponent's computer systems is a Rule 30(b)(6) deposition of a designated IT person. Such a deposition can provide substantive information about systems and document management protocols and shape further discovery. FRCP 30(b)(6); see, e.g., *Carbon Dioxide Industry Antitrust Litigation*, 155 F.R.D. 209, 214 (M.D. Fla. 1993)(depositions aimed at acquiring information about data maintained on defendants' computers as well as hardware and software needed to access the information were necessary to proceed with substantive discovery); *Alexander v. FBI*, 188 F.R.D. 111 (D.D.C. 1998)(court permitted deposition to learn about email systems and system for acquisition, location, and disposition of computers to guide substantive discovery).

### **Scope of Discovery**

FRCP 26(b)(2) provides protection from unduly burdensome or expensive discovery requests. A court may deny a discovery request or require a requesting party to pay expenses if the burden or expense of the proposed discovery outweighs its likely benefits. *Simon, supra* at 640, citing FRCP 26(b)(2)(iii); *Bills, supra* at 462.

In the context of electronic discovery, questions of undue burden and expense typically arise when a request calls for data that is not readily retrievable, such as data that has been "deleted," is stored on an outdated system, or is no longer available in electronic form. Production might require, for example, restoration of backup tapes or creation of programs to search for and retrieve responsive data. In such circumstances, some producing parties have argued that costs of production should be shifted to requesting parties.

Such efforts to shift costs have yielded mixed results. Some courts have ordered a requesting party to pay extraordinary costs of production. See, e.g., *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 U.S. Dist. LEXIS 16355 (S.D.N.Y.) (plaintiff ordered to pay defendant's costs in creating computer programs to extract requested data); *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 634 (E.D. Mich. 1989) (requesting party ordered to pay for creation of computer tape). Others have required parties to restore responsive information at their own expense, denying claims that substantial costs involved were "undue." See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 U.S. Dist. LEXIS 8281 (E.D. Ill.) (producing party required to develop, at own expense, a retrieval program to access emails from backup tapes, though estimated cost was \$50,000 to \$70,000). In *Linnen*, defendant Wyeth estimated that restoring backup tapes containing potentially relevant information could cost over \$1 million. The court deferred ruling on restoration of all the tapes, awaiting results of a sampling, but indicated that Wyeth would be required to bear the cost. It reasoned that it would be unfair for a corporation to enjoy the benefits of technology and also to use it as a shield in litigation. *Id.* at 17-18.

Case law on the subject of cost allocation offers no predictable outcomes. *McPeck, supra*, at 33 (cases on restoration of backup tapes "are idiosyncratic and provide little guidance"). It is clear at least that substantial cost alone will not defeat a request or justify shifting of expenses. *Linnen, supra* (cost of restoring backup tapes a risk taken on by companies that choose to use computer technology); *McPeck, supra* (suggesting a "marginal utility" analysis); *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 2002 U.S. Dist. LEXIS 488 (S.D.N.Y.) (adopting a balancing approach considering various factors).

Besides running the risk of costly retrieval at its own expense, a party that is unable to readily produce responsive data may open itself to intrusive measures: an opponent's expert may be given direct access to its computers. For example, in *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), the court ordered such an inspection after the defendant testified that she routinely deleted emails and could not retrieve them. In *Simon*, the court noted "some troubling discrepancies" in defendant's document production. It accordingly allowed plaintiff's expert to create a "mirror image" of and examine the defendant's hard drive to attempt to recover deleted files. *Id.* at 641; see also *Procter & Gamble v. Haugen*, 179 F.R.D. 622, 632 (D. Utah 1998) (allowing a keyword search of opposing party's database to extract relevant information).

If a corporation's own information management - or lack thereof - contributes to its discovery difficulties, it is especially unlikely to find a court sympathetic to its pleas for relief. See, e.g., *Itzenson v. Hartford Life and Accident Ins. Co.*, 2000 U.S. Dist. LEXIS 14680 (court found defendant's assertion it could not retrieve certain statistics "difficult to believe ... in the computer era"); *Brand Name Prescription Drugs, supra* at 6 (defendant should pay to devise email-retrieval program because expense was "a product of the defendant's record-keeping scheme"); *Toledo Fair Housing Center v. Nationwide Mutual Ins. Co.*, 703 N.E.2d 340 (Ohio Ct. of Common Pleas 1996) (defendant could not "frustrate discovery of relevant material because the method it has chosen to store documents makes it burdensome to retrieve them"). In *Brand Name Prescription Drugs*, the defendant acknowledged that part of its problem retrieving stored information was the limitations of the software it was using. The court reasoned that it would be unfair to impose upon plaintiffs the cost of defendant's choice of inferior electronic storage media. *Id.*

As in matters involving paper discovery, courts are unimpressed with vague claims that a particular request is unduly burdensome. *Zonaras v. General Motors Corp.*, 1996 U.S. Dist. LEXIS 22535 (S.D. Ohio) (plaintiffs' "specific and detailed arguments" to compel production of electronic crash test results prevailed over "unspecified burden" claimed by defendant); *Simon, supra* at 640 (plaintiff's expert given access to defendant's hard drive; defendant provided "extremely sparse" information about computers and networks in dispute and potential costs and business disruptions of the procedure).

### **Form of Production**

A producing party should not expect to meet discovery obligations by providing hard copies of electronic data. Data is discoverable in computerized form even if the same information has already been produced on paper. *Anti-Monopoly, supra*. While computer-based documents may be technically usable in printed form, they are unnecessarily cumbersome

for a requesting party to review. When further analysis would entail substantial costs in re-inputting data, courts have ordered producing parties to provide materials in computer-readable form. *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980); *Air Crash Disaster*, *supra* (defendant ordered to provide on computer tape material already produced in printed form). Production in a form directly readable by the adverse party's computers decidedly is the "preferred alternative." *National Union*, *supra*, at 1262.

In *National Union*, the plaintiff produced requested data in the form of a computer printout. The court described the problem: "The printout can, of course, be read by defense counsel. However, it cannot be read by defense counsel's computer." *Id.* at 1258. Because further computer analysis would require extensive clerical work to re-input the data, the defendant moved to compel production in computer-readable format. The court acknowledged that National Union would have to create a computer tape that did not exist before, but nevertheless ordered production, reasoning that the manufacture of a computer-readable response was "in principle no different from the manufacture of a photocopy of a printed document." *Id.* at 1261-62. Similarly, in *Storch v. IPCO Safety Products Co.*, 1997 U.S. Dist. LEXIS 10118 (E.D. Pa. 1997), the plaintiff specifically requested data in disk format to enable computer analysis relevant to her damage claim. The defendant responded instead with "hundreds of pages of paper." The plaintiff moved to compel production of a disk; without it, she would incur between \$10,000 and \$20,000 in encoding fees to format the information. Citing *National Union*, the court found that "in this age of high-technology where much of our information is transmitted by computer and computer disks, it is not unreasonable for the defendant to produce the information on computer disk for the plaintiff." *Id.* at 6.

## Document Retention and Spoliation

Besides anticipating the logistics of discovery response, a corporation must consider its legal duty to preserve evidence. If a corporation knows or should know that particular documents may eventually become material in litigation, it must preserve them. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir.1987). The duty to preserve evidence applies to electronic evidence as well as to paper. *Procter & Gamble*, *supra*; see *William T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F. Supp. 1443 (C.D. Cal. 1984).

Once litigation is pending or imminent, a party must take affirmative measures to preserve potential evidence that might otherwise be destroyed in the course of business. Usual procedures for data destruction or recycling may have to be suspended. In *Procter & Gamble*, for example, Procter & Gamble initially disclosed that emails of five key employees might be relevant. Then, however, it failed to preserve the emails. Though the court had not issued a specific preservation order, it imposed a \$10,000 fine for this "sanctionable breach of P&G's discovery duties." *Id.* at 632. See also *Applied Telematics, Inc. v. Sprint Communications Co.*, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996)(Sprint's normal procedure of recycling backup tapes should have been suspended during litigation); *Linnen*, *supra* (defendant continuing customary recycling of backup tapes after plaintiffs' discovery request was "inexcusable conduct").

In *re Prudential Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997) dramatically illustrates the duty to preserve electronic evidence. Prudential, alleged to have engaged in deceptive sales practices, was ordered to preserve all potentially relevant records. In spite of the order, its employees in at least four locations destroyed outdated sales materials. Further discovery revealed that Prudential had distributed document retention instructions to agents and employees via email - but that some employees lacked access to email and others routinely ignored it. Prudential also distributed a hard copy memorandum, though not universally. Senior executives never directed distribution of the court's order to all employees.

The court found Prudential's efforts inadequate, noting the lack of a "clear and unequivocal document preservation policy." *Id.* at 614. Though the court found no willful misconduct, it nevertheless inferred that the lost materials were relevant and would have reflected negatively on Prudential. Citing Prudential's "gross negligence" and "haphazard and uncoordinated approach," the court imposed a sanction of \$1 million. *Id.* at 617.

Though they may harshly punish litigants for failure to preserve evidence, courts also recognize that certain documents are destroyed in the ordinary course of business. See, e.g., *Linnen*, *supra*, at 3 (recycling of backup tapes is, under

normal circumstances, a "widely accepted business practice"). Not every missing document supports a finding of spoliation. No unfavorable inference can be drawn from destruction of documents when the circumstances properly account for it. *Lewy, supra, citing Gumbs v. International Harvester Inc.*, 718 F.2d 88 (3rd Cir. 1983); *Crescendo Investments, Inc. v. Brice*, 2001 Tex. App. LEXIS 3479, 28 (party's testimony that he routinely deleted emails after reading them supported finding he had no fraudulent intent). A party may defeat a claim of spoliation by showing that evidence was destroyed pursuant to a valid and consistently enforced document management policy. *Lewy, supra; Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984). The basic standard, set forth in *Lewy*, is whether a document retention policy is reasonable.

In *Lewy*, the defendant firearms manufacturer had destroyed customer complaints and gun examination reports pursuant to its records retention policy. The court delineated factors determining whether destruction pursuant to such a policy justified a "negative inference instruction." Specifically, the court remanded with instructions to consider: (1) whether the policy was reasonable given the facts and circumstances of the relevant documents; (2) whether lawsuits or complaints had been filed, and the frequency and magnitude of any such complaints; and (3) whether the policy was instituted in bad faith, to limit evidence available to potential plaintiffs. *Id.* at 1112. The court emphasized that, whatever the dictates of a corporate policy, a corporation must preserve those documents that it knows or should know may become material in litigation. A company cannot shield itself with a policy of wholesale document destruction. *Id.*; see also *Carlucci, supra* (default judgment entered where stated purpose of document policy was to destroy documents that might prove detrimental in litigation).

## Ten Tips for Establishing an Effective Electronic Discovery Response Plan

A corporation that plans ahead places itself in the best position when litigation arises. In-house legal and IT departments and outside counsel can work together to make proper electronic data management the foundation for effective discovery response.

### Inside Counsel

1. Consider implementing a formal document retention policy to formalize rules for saving and destroying documents. Be sure that the policy includes electronic information, and that employees understand the purpose of the policy and the importance of compliance.
2. Focus on making litigation preparedness a part of employees' daily work. Increase company-wide awareness of the types of information that must be disclosed in litigation. Educate all employees about the pitfalls of carelessly destroying or retaining information. Train employees to document and store their work in an organized fashion.
3. Establish a working relationship between in-house legal and IT personnel. Provide guidance to IT personnel about document retention and destruction, and enforcement of a formal document retention policy if one is in place. Make IT employees aware of the problems of retaining too much information for too long.
4. Organize data storage efforts and establish systems that simplify later identification, retrieval and production of responsive information. Talk to IT personnel about the implications of choosing software and changing systems. Consider capabilities that may be relevant to a discovery response: How is data stored? In what format is it stored? Is it searchable? What about information from systems no longer in use?
5. To preserve evidence when necessary, outline a specific plan for the suspension of usual document destruction and backup tape recycling protocols. Identify key employees from the legal and IT department to be involved as soon as litigation is pending or imminent. Determine how best to distribute evidence preservation instructions to all employees.

6. Designate and train an IT representative to act as the corporation's 30(b)(6) deposition witness when electronic data storage may be at issue. Advise key IT employees that clear communication with outside counsel will be necessary to properly respond to electronic document requests.

### **Outside Counsel**

7. Expand working knowledge of client operations to include client information systems: What information is maintained? How is it stored? What will the procedures for and costs of retrieval be if an electronic discovery request is received? With a solid working knowledge of client systems, outside counsel will be equipped to establish discovery parameters with opposing counsel early in the case and challenge overbroad requests if necessary.
8. Maintain a focus on minimizing disruption of client operations. Work with IT personnel and inside counsel to reduce the time individual employees must divert to examining their files for responsive information. Know how to use technology to protect employees' time and produce timely, accurate responses. Prompt and complete discovery responses can prevent the imposition of intrusive measures, such as on-site inspections.
9. When a document request is received, adequately explain the scope of the obligation to search different systems and storage media. Do not expect a written document request to be self-explanatory. Be a partner in the data retrieval process, not just the vehicle for the message.
10. Become acquainted with key IT personnel. Educate them about the types of documents most frequently requested in litigation as well as questions they can expect if deposed. Prepare with them to make a prompt and thorough inventory of stored information when litigation arises.

## **Conclusion**

While electronic discovery disasters—crushing costs, harsh sanctions, and even default judgments—can strike those caught unready, great benefits are available to those who prepare. In-house counsel, litigation attorneys, and IT personnel all have a role to play. Electronic discovery response planning is not just a matter of gathering responsive information, but of working in advance to control what information is created and how it is stored. Successful discovery response begins with making data management a part of daily business operations. Attorneys cannot accomplish this objective without involving IT personnel, nor can IT personnel properly maintain electronic data without guidance from counsel about what should be kept or destroyed. Outside counsel can help by providing ongoing advice about the law of electronic discovery and what to expect in the process.

As a part of discovery planning, attorneys and IT personnel should also educate themselves about how available technology can streamline the discovery process. When litigation arises, they can take advantage of technology to gather and review information without substantially disrupting operations. Technology exists to provide lawyers with tools and resources to handle complex discovery in a speedy, cost-efficient manner without interrupting the workflow of familiar business and discovery practices. With the use of such tools, corporate lawyers can gain control over data retrieval and review processes, while outside counsel can enjoy a tremendous advantage in preparing client cases for best resolution.

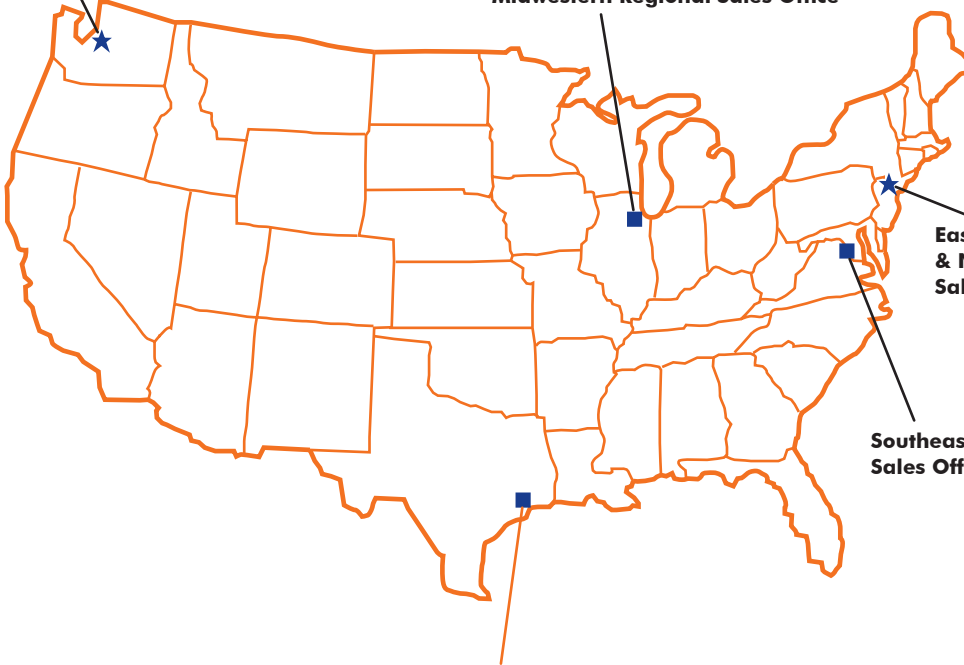
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