Preserving Documents

Ethics and E-Discovery

by James P. Schaller

On April 23–24, 2003, DRI presented a Defense Practice Seminar on Electronic Discovery in Washington, D.C. An outstanding roster of experts provided fascinating looks into this emerging practice, including some ethical issues implicated. U.S. Magistrate Judge John Facciola and attorney Ashish Prasad particularly stressed the ethical implications and pitfalls of e-discovery.

The most fundamental demand upon defendants in responding (or preparing to respond) to e-discovery, Mr. Prasad said, is the need to preserve electronic documents and other data. Compliance with preservation requirements can be extremely costly and difficult, but the consequences of non-compliance may be disastrous.

The extent of the preservation effort will to some extent depend upon the magnitude and importance of the case. Inquiry by the producing party into what is available will always be required, but massive intrusive production is only justified in the larger cases.

It is critical that the producing party have in place a defined, rational preservation process—documented by counsel so that its reasonableness can be demonstrated to the court. Failure here can result in heavy fines, costly orders to re-do discovery efforts or re-create data, adverse inference jury instructions, or Rule 37 (Federal Rules of Civil Procedure) sanctions barring defenses or deeming certain claims by the party seeking discovery established.

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In short, the *absence* of records that the plaintiff desperately needs to prove its case can be "better than the real thing," if the court instructs the jury that it may draw adverse "spoliation" inferences from it. Records within the control of the responding party—and such records as one would reasonably expect that party to preserve—must, in fact, be preserved.

Judge Facciola commented on situations where the demand to the producing party is simply to turn over its "hard drive" or everything on it that might be relevant to the claims at issue. The cost of retrieving and screening that information can be prohibitive. The producing party may be tempted to yield to a demand by the party seeking discovery to be given access to the hard drive to conduct its own search for evidence at its, rather than the producing party's, expense.

In such circumstances, the producing party must accept on faith that if the opponent comes across privileged or otherwise irrelevant or prejudicial material, she will forebear to use it or even examine it carefully. That raises enormous ethical issues for both the party seeking production and the producing party.

Can the producing party trust its opponent not to copy, analyze, and use prejudicial information? Should he? In the event of an attempt to use such information, won't the opponent claim waiver by virtue of the turn-over of the data by the producing party? If there is an agreement not to examine or utilize such material, does that get in the way of inquiring counsel's obligations to his or her client? Assuming such material is stumbled upon and read before its privileged nature is appreciated, what is discovering counsel's obligation to his client and to his opponent?

Responding to this kind of discovery requires counsel to acquire intimate knowledge of the client's business, so that processes can be validated and defenses to overly intrusive electronic discovery can be devised. Under any conceivable circumstances, the potential costs are considerable.

Counsel responding and defending against aggressive e-discovery will have to know the record-keeping personnel both within and outside the client's organization. The interface between legal counsel and technical support personnel—and between in-house and outside technical people—is likely to be strained, at best, and the more prickly that relationship, the more likely it is to spring "leaks" and compromise privileged communications and other material.

Since e-documents can be altered, it is vital to create a methodology that avoids inadvertent data corruption. It is equally important to develop appropriate forensic techniques to assure that electronic data can be received in evidence without distortion or destruction. Should such corruption occur, the producing party must be prepared to disclose that fact as part of its responsibility of candor to the court and counsel.

Costs—for tapes, processing, consultants, business interruption and lost Information Technology time—can be formidable. Courts have been receptive to the argument that IT personnel are employed to support the business of an organization, not to provide litigation support. But there are records courts will expect organizations and individuals to create and preserve, and the failure to satisfy those expectations could be catastrophic.

These are cutting edge issues. Courts are entering new and uncharted territory. Plaintiffs are aggressively seeking changes in the Federal Rules and their state counterparts to impose new and unfair burdens on parties responding to e-discovery. Educating the defense bar to the pitfalls, ethical and otherwise, is crucial to devising sensible and fair rules of engagement. Educational offerings for defense lawyers, such as the recent DRI seminar in Washington, are invaluable steps in that process.