

RESPONDING TO LITIGATION NEEDS: WHO, WHEN & WHAT

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Education Code: XXXX-XXXX



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Learning Objectives

Upon completion of this session, you will be able to:

1. Become aware of the central role of information governance during each stage of litigation and the duties that personnel may have at each stage.
2. Recognize the importance of creating procedures within HIM and IG to avoid the unpleasant consequences of failure to preserve electronic information, produce it, or comply with orders of the courts.

Biography

- United States Magistrate Judge, District of New Jersey, 1986-2007
- Chair, Advisory Board, *Digital Discovery & e-Evidence* (a Bloomberg BNA publication)
- Lead author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Co-Senior Editor, *The Sedona Conference® Cooperation Proclamation Resources for the Judiciary* (all editions)
- Member, Committee on Technology and the Legal Profession, New York State Bar Association
- Etc.

Generally Accepted Recordkeeping Principles

- Accountability
- Transparency
- Integrity
- Protection
- Compliance
- Availability
- Retention
- Disposition

The Duty to Preserve

- Obligation to retain vs. duty to preserve.
- Records retention policies and duties.
- “Triggering” the duty to preserve.
- Defining the scope of the duty to preserve.
 - *Fed. R. Civ. P.* 26(b)(1)
 - *Fed. R. Civ. P.* 34(a)
- Scope has two dimensions:
 - Temporal
 - “Spatial”

The Duty to Preserve

Fed. R. Civ. P. 26(b)(1):

“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”

The Duty to Preserve

Has the amendment changed scope?

- Yes: *In re Bard IVC Filters Prod. Liab. Litig.*, No. MDL 15-02641-PHX-DGC (D. Ariz. Sept. 16, 2016) (“marginal relevance” and proportionality) and *Tohono O’odham Nation v. Ducey*, No. CV-15-01135-PHX-DGC (D. Ariz. Dec. 19, 2016).
- No: *Gonzalez v. Allied Concrete Ind., Inc.*, No. CV-14-4771 (E.D.N.Y. Aug. 23, 2016) (reemphasis on proportionality but not substantive change in scope).

The Duty to Preserve

- Proportionality is an “amorphous” and “highly elastic” concept and may not “create a safe harbor for a party that is obligated to preserve evidence.” *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010).
- An order might reflect a “reasonable compromise between the parties’ positions.” *Botley v. Green*, No. 12-cv-01520, 2016 WL 1357708 (M.D. Pa. Apr. 4, 2016).

The Duty to Preserve

Fed. R. Civ. P. 34(a):

“A party may serve on any other party a request within the scope of Rule 26(b):

- (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
 - (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
 - (B) any designated tangible things ***.”

The Duty to Preserve

- *Banks v. St. Francis Medical Center, Inc.*, No. 15-cv-2602 (D. Kan. Nov. 23, 2015) (denying motion to compel discovery of defendant's preservation and collection methods absent showing of "specific instances and examples" of unreasonable or inadequate efforts).
- *Little Hocking Water Ass'n Inc. v. E.I. DuPont De Nemours & Co.* (S.D. Ohio. Sept. 20, 2013) (denying leave to conduct discovery of litigation hold: "Based on the present record, the Court is not convinced that a preliminary showing of spoliation has been made. Rather, *** contention that information *** has been destroyed is speculative at best.").

The Duty to Preserve

Sources could include:

- E-mail
- Text messages
- Websites
- Social media
- Mobile apps
- What else?

The Duty to Preserve

Created by:

- Directors, officers, employees
- Third party consultants or contractors
- Algorithms
- Who or what else?

The Stages of Litigation

- Before the filing of a complaint
- On or after the filing of a complaint
- “Written” discovery
 - Interrogatories
 - Requests to produce
 - Subpoenas to non-parties
- Depositions
- Motion practice
 - Motions to compel, etc.
 - Motions for sanctions
- Trial

Possible Roles

Who does what at each stage?

- Before the filing of a complaint
 - Communicating, instituting and monitoring the legal hold
 - Collecting the EHR, paper and “things”
- On or after the filing of a complaint
- “Written” discovery
 - Electronic information
 - Paper and “things”

Possible Roles

- Depositions
 - Custodian of records
 - Fact witness
 - Expert witness
- Motion practice
 - Affidavits
 - Testimony
- Trial
 - Authenticating electronic information
 - Fact witness
 - Expert Witness

Possible Roles – Depositions

Fed. R. Civ. P. 30:

“(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.”

Possible Roles – Depositions

“(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.”

Possible Roles – Depositions

“The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. ***. It will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. ***. The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. ***”

Possible Roles – Depositions

Miller v. York Risk Services Grp., No. 13-cv-01419-JWS (D. Ariz. Apr. 15, 2014):

Plaintiffs moved for order compelling defendant to participate in 30(b)(6) deposition “regarding the manner and methods used *** to store and maintain” ESI.

Plaintiffs argued deposition will allow them to “tailor their discovery requests to avoid potential disputes over what may be discovered.”

Possible Roles – Depositions

Denied:

“The court’s view is that starting discovery with such an inquiry puts the cart before the horse and likely will increase, rather than decrease, discovery disputes. Instead of beginning with a deposition that address nothing but process, discovery should start with inquiries that seek substantive information. If Defendant then asserts that retrieving relevant information stored electronically would be unduly burdensome, it might then be appropriate to proceed with a 30(b)(6) deposition of the type Plaintiffs seek.” (footnote omitted).

Possible Roles – Fact or Expert Witness

To determine whether there was a failure to preserve or search adequately, a hearing might address:

1. “what did Defendant’s system of creating and storing ESI consist of;
2. when and how a litigation hold was instituted;
3. What employees were notified of the litigation hold;
4. What efforts were made to preserve ESI;
5. What or whose computers *** were searched for responsive ESI;
6. How the computers *** were searched (e.g., keyword searches, manual review, computer-assisted coding); and
7. Who performed the searches.”

Chura v. Delmar Gardens, Civil Action No. 11-2090 (D. Kan. Mar. 20, 2012).

Possible Roles – Fact or Expert Witness

Rule 701. Opinion Testimony by Lay Witnesses:

“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness’s perception;

(b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

Possible Roles – Subpoenas

Fed. R. Civ. P. 45(a):

“(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control; or permit the inspection of premises

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.”

Possible Roles – Subpoenas

Fed. R. Civ. P. 45(d)(1):

“Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.”

Possible Roles – Subpoenas

“Practical Guidelines to follow to shift costs under Rule 45:

As a non-party faced with overly broad and burdensome discovery requests ***, make sure to properly object and refuse to comply in order to trigger Rule 25(d)(2)(B)(ii).

- Estimate the costs of compliance *** as specifically as possible, including the details of the time and all associated expenses.

Possible Roles – Subpoenas

- If the cost estimate is ‘significant,’ put the requesting party on notice from the outset.
- Attempt to obtain an agreement *** for reimbursement ***.
- Absent an agreement, seek protection from the court.
- Keep a detailed record of the expenses involved in compliance ***.”

S.K. Maheshwari & S.S. Eskandari, “Shifting the Cost of Complying with a Rule 45 Subpoena,” *Dentons Legal Notices* (posted Sept. 15, 2014).

Possible Roles – Admissibility

Fed. R. Evid. 902:

“The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: * * *

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Possible Roles – Admissibility

Fed. R. Evid. 902:

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12).”

Possible Roles – Admissibility

Committee Note to 502(13) and (14) both provide:

“A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certificate provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.”

Possible Roles – Admissibility

Committee Note to 502(14) provides:

“This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.”

What Happens if Something Goes Wrong

Fed. R. Civ. P. 37(a)(1):

“On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

Fed. R. Civ. P. 37(b) addresses failure to comply with a court order.

What Happens if Something Goes Wrong

Fed. R. Civ. P. 37(e):

“If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

What Happens if Something Goes Wrong

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may,
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.”

What Happens if Something Goes Wrong

Since “reasonableness” is central to avoiding remedies:

Will process become central to any analysis of reasonableness? (*modus supra materiem*)

Yes or no, shouldn't process be documented and monitored for effectiveness and modified as necessary?

What Happens if Something Goes Wrong

- Can an organization guard against intentional loss of relevant ESI that is subject to a duty to preserve? (maybe, depending on “reasonable steps” taken, etc.).
- Can an organization be sanctioned for the wrongful conduct of an employee? See *Selectica, Inc. v. Novatus*, No. 13-cv-1708 (M.D. Fla. Mar. 12, 2015) (yes); *GN Netcom, Inc. v. Plantronics, Inc.*, Civil Action No. 12-1318-LPS (D. Del. July 12, 2016) (same).

Please Complete Your Session Evaluation!

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Location	Anaheim Convention Center
Date	Monday, October 22, 1:00PM
Duration	1 hour 15 minutes
Job	An outline will be created during the workshop to help implement the Principle of Availability
Aids/Tools	
Learning Objective(s)	Upon completing this session, you will be able to: 1. List the considerations for the Principle of Availability 2. Utilize the experiences of others to improve your own program maturity 3. Identify business