

TechnoFeature™

Practice management and technology articles written by experts.

eDiscovery: Everything You Need to Know About Preservation

By Brett Burney

INTRODUCTION

Electronic discovery remains an abstract concept for a lot of people. The term is applied to a vast array of practices in litigation today, but it does not demand a mutation of the historic principles of law.

For example, the principle of preservation is a well established axiom in the law, but it bulges with aggravating complications when it's applied to electronic data.

Historically, preserving relevant documents for a litigation matter meant pulling pieces of paper out of an old, dusty filing cabinet and setting them aside in anticipation of a request for them from opposing counsel. The preservation obligation prohibited one from intentionally burning, shredding, or otherwise destroying any paper document that may prove relevant to a pending or anticipated litigation matter. If a party intentionally destroyed relevant documents (also known as [spoliation](#)), a court could punish the act with sanctions, adverse inferences, or even a default judgment.

The concept of preservation sounds simple enough to apply to the electronic world. After all, you could simply ask your client to save all relevant email messages and electronic documents. Just hit the File > Save menu button or print it out — what could be so difficult about that?

YOU SAY “EDISCOVERY,” I SAY “EEK-DISCOVERY!”

Electronic data presents a plethora of additional considerations that one must rake through in order to assure legitimate and thorough preservation.

First, electronic data is dynamic. Because of the nature of software applications interacting with operating systems and storage media, information about

files and documents is modified regularly through no intentional act of the computer user. This information is commonly referred to as [metadata](#) and records characteristics of files such as when it was last accessed and modified. Simply opening an electronic document to view its contents will modify the metadata which could raise the suspicion of tampering with relevant evidence.

Simply opening an electronic document to view its contents will modify the metadata which could raise the suspicion of tampering with relevant evidence.

Second, electronic data is not always suitable for printing. Word processing applications conveniently define a page as a standard 8" x 11" piece of paper. But in reality, there are no “page numbers” for electronic documents — the limitation only exists for our benefit when we hit a print button. You can force Excel spreadsheets to fit within a print boundary, but in electronic form they can extend for hundreds of columns and rows that would take reams of paper to print.

Lastly, the storage of electronic data is incredibly diverse. It may not be sufficient to simply search one or two computers. Depending upon the issues involved in a litigation matter, you may need to gather data from network servers, cell phones, home computers, Internet email accounts, and wireless email devices. Due diligence demands a thorough search through a wide variety of hideouts for relevant electronic data.

(Continued on next page)

THE CYBER-BUCK STOPS HERE

Once you realize the unique characteristics of preserving electronic data, you must designate someone to manage the preservation project. It is becoming clear that attorneys have an ethical responsibility to continually inform their clients on how to properly and legitimately preserve relevant electronic data ([see in general the Zubulake opinions](#)).

It is no longer sufficient to send a blanket letter to be distributed at your client's place of business informing specific employees to save documents associated with a particular matter. Attorneys today are expected to become knowledgeable about their clients' information systems so they can be more specific in their instructions for litigation hold procedures.

For preservation projects to be effective today, attorneys must seek the knowledge of IT professionals in their clients' employ.

Employees may be able to save a limited number of documents and files from their own computer workstations, but attorneys may require the involvement of the IT department to preserve email and other files that float around the enterprise network. For preservation projects to be effective today, attorneys must seek the knowledge of IT professionals in their clients' employ, and attorneys must do their best to appreciate the intricacies of the technology. This is the only way attorneys can successfully craft an effective strategy for preserving relevant electronic data.

On the legal side, attorneys must shoulder the responsibility for deciding when the duty to preserve electronic documents arises. The easy answer would be when a complaint is filed against your client. But common law in this country dictates a more obtuse guideline — the duty to preserve electronically stored information arises when a party reasonably foresees that the information may be

relevant to future litigation. The precept is not new, but that doesn't mean the application is clear in the digital realm. Case law continues to attempt to define this duty, but one could conclude that it is safer to over-preserve than risk a spoliation claim.

On the practical side, however, an attorney must balance this confusing standard with their client's need to comfortably continue their business routines. Taking the time to preserve documents, or have IT teams extract email or backup data, can have a severe impact on a business's resources and bottom line.

WHERE WOULD YOU LIKE TO MEET?

If this discussion of preservation of electronic data confuses you, take heart in the fact that you're not alone. While you may be able to pinpoint a time when litigation against your client could reasonably be foreseeable (i.e. a dismissed employee has threatened to file a discrimination suit), your next hurdle lies in deciding exactly what to preserve.

Ordering a blanket preservation notice for all related electronic data can quickly become overwhelming. The best way to start narrowing down the universe of relevant documents is to start talking with the opposing side as soon as possible. That may sound contrary to the norm in our legal adversarial system, but even the amendments to the Federal Rules of Civil Procedure now mandate a "meet and confer" session between the parties ([see FRCP 26\(f\)](#)). This meeting gives both sides an opportunity to share technical aspects of their client's information systems so both sides can start to focus on specific collections of information. Both sides can narrow down the list of "key players" involved in the matter so that attention can be directed specifically to their email and document storage collections.

Armed with the information from these sessions, both sides can provide more detailed instructions to their clients, the "key players," and IT departments. For example, your client may need to provide financial records from 10 years ago. While that information may not be readily accessible by anyone in your client's current accounting department, the IT department can possibly restore that information from online or offline backup systems.

(Continued on next page)

You must also inquire about any automated deletion systems that might be in place for email or electronic documents. If such practices do exist, then you must investigate whether they should be shut off or temporarily disabled. Otherwise, valuable, relevant data could be erased or deleted (destroyed) without any purposeful intent to do so.

Lastly, you may need to dig deeper into the personal computer habits of the “key players.” For example, you will need to know if employees regularly save documents to their local computer’s hard drive. You need to know if employees use personal email accounts for business purposes. And you need to know if any of the key players use PDAs, BlackBerrys, USB memory keys, and home computers so you can determine if relevant data could exist on any of those devices.

CONCLUSION

Effective preservation of electronic data may seem like an overwhelming task, but it has become a

necessary evil in today’s digital world. Educating yourself in the intricacies of how electronic information is stored, and asking your client and their IT department a lot of questions can help you go a long way in getting a good grasp on effective preservation techniques for relevant electronic data.

Copyright 2007 Brett Burney. All rights reserved.

ABOUT THE AUTHOR

Brett Burney is the Principal of [Burney Consultants LLC](http://BurneyConsultants.LLC) where he focuses his time on bridging the chasm between the legal and technical frontiers of electronic discovery. Burney Consultants also provides exceptional support for litigation databases, document review projects, and trial technology. You can visit www.burneyconsultants.com for more information and subscribe to the [eDiscoveryinfo blog](http://eDiscoveryinfo.blog).

Contact Brett:

E: burney@burneyconsultants.com

About TechnoFeature

Published on Tuesdays, *TechnoFeature* is a weekly newsletter containing in-depth articles written by leading legal technology and practice management experts, many of whom have become “household names” in the legal profession. Most of these articles are TechnoLawyer exclusives, but we also scour regional legal publications for superb articles that you probably missed the first time around.