Data Policy Saves In Litigation

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Not until I became a litigator did I realize what "a stitch in time saves nine" really means. All too often, clients wind up incurring significant legal fees defending avoidable lawsuits. I have handled cases in which simply documenting a conversation could have avoided tens of thousands of dollars in legal fees.

Lawyers are seeing the adage come into play frequently in e-discovery, the process by which parties in litigation discover and exchange electronically stored information. Unfortunately, many companies, while they have heard of e-discovery, are not sure what it means or how it affects them. When these companies are in litigation, they're content to ask the employee involved to look through his in-box, sent, and deleted items and print out what seems relevant. The employee might even run a few word searches to find relevant information.

In other words, even in 2011, e-discovery is something that many companies do not seem to care much about.

Here's why you need to care -- companies are getting into trouble for it. According to a recent study appearing in the *Duke Law Journal*, nearly 300 federal court judges in 44 states have issued opinions regarding sanctions for e-discovery conduct. In other words, there are problems with the process everywhere.

The most recent opinion was issued by U.S. Magistrate Judge Paul W. Grimm in Maryland on Jan. 24. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Judge Grimm ordered the defendant pay sanctions of $1,049,850.04 for a long list of e-discovery violations. Keep in mind these are sanctions, and the trial is yet to occur.

Granted, the defendant, despite warnings, repeatedly destroyed computer files. This made an award of sanctions easy, but the court also faulted the defendant for its failure to implement a proper litigation hold. A litigation hold is the process by which a company preserves evidence, both paper and electronic, once a dispute arises.

In fact, the *Duke Law Journal* article found a failure to implement proper preservation procedures was the most common misconduct in the cases studied. While sanctions rarely reach the level awarded by Judge Grimm, they can include orders that prohibit companies from offering evidence and putting on witnesses. Such orders may also tell juries that they may conclude the lost e-mails contained information detrimental to the party who lost them. Clearly, none of these are helpful to a company's case.

Litigation holds differ because the evidence a company may need varies by case. However, companies should prepare now so they will be ready when litigation arises. The following four steps will make the litigation hold process go smoothly and make it less likely that sanctions will be imposed.

• Form a team. The e-discovery team starts with whoever tends to deal with outside counsel in making litigation decisions. This may be an in-house attorney in larger organizations, or it could be the chief executive or chief financial officer in smaller ones.

A representative from the IT department should be part of the team, because this department plays a crucial role in preserving evidence. HR representatives are also valuable members of the team, as they have daily oversight of employees and can ensure instructions to preserve evidence are carried out.

In companies with multiple locations, office and department managers should be included. If the organization has a records management specialist, he should be part of the team.

When litigation arises, this team should meet often to ensure that it complies with instructions from outside counsel and the court.

• To implement an effective litigation hold, the team must have a general understanding of the layout of the company's IT system, where data typically resides, and what types of devices are used throughout the company. The team should create data maps showing how systems are configured. The team must know what kinds of data get backed up and how. Which kinds of data can be retrieved easily and which can be retrieved only through significant expense. Understanding and then conveying all this information will serve outside counsel well during an initial discovery conference with the judge and opposing counsel.

• Understand the company's data retention policy. IT departments find themselves under increased demands for more storage space. Data retention policies help resolve these demands by ensuring every piece of data is not kept forever. These policies also benefit e-discovery, as they limit the universe of information that a company sorts through as part of a lawsuit. To borrow from another old expression, these policies make the haystack much smaller.

• If there is no data retention policy, create one.

Judge Grimm's recent decision is garnering national attention for the sheer size of the sanctions award. The amount is astonishing, and if the case were a prizefight, the defendant certainly took a beating. Many people would say litigation is indeed like a fight, as it can be expensive, tiresome, and painful. While putting time and effort into this process now may not keep you out of the ring, it surely will save you quite a few stitches.

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