

Making Your Company Sanction-Free in the Age of E-Discovery

By Jennifer Bailey

By now, you are probably well aware that a document request during litigation discovery is not asking for just paper documents. Instead, a document request can seek any electronic document, such as e-mails, PowerPoint® presentations, word processing documents, instant messaging files, voice mail files, .pdf files, .tif files, etc. Gathering these documents and complying with document retention rules is often seen as an insurmountable task by the company. Improper compliance, however, could expose the company to costly sanctions by the court. A few key steps can help reduce your company's costs and time in responding to discovery requests, and, most importantly, reduce your company's exposure to sanctions.

Know What Documents You Have and Where They Are Stored

The most difficult aspect of e-discovery for a company is usually the collection of documents. You can facilitate document collection by knowing what documents your company normally keeps and how and where your company's documents are electronically stored. This process is often referred to as a **data map** of the company's document custodians and electronic storage capabilities. Your company's IT support team (or individual) can assist, and possibly completely undertake, the data mapping process.

A data map is literally a diagram, list, or spreadsheet of every custodian of documents (whether electronic or paper and in all forms). For example, for each department, list all the employees. For each employee, list every electronic item the employee stores documents on, whether it be their handheld device, a computer, a storage medium for a camera, etc. Knowing who creates documents and where those documents are stored is half the battle in document collection during discovery.

Know Your Company's Software Programs and Infrastructure

Just as knowledge of who creates and stores documents is important, knowing the software programs used to create the documents and the infrastructure that accomplishes document storage and archival is necessary. Take an inventory of the company's hardware (e.g., computers, PDAs, cameras), software, and storage systems (servers, archival or back-up tapes, disaster recovery methods). Having a summary of these items can be invaluable when unexpected litigation arises.

Know When to Stop Destroying Documents

A company has an obligation to cease destroying documents potentially relevant in a litigation once litigation is known, anticipated, or reasonably anticipated, referred to as a **litigation hold**. The company's anticipation of the litigation can come well prior to the lawsuit actually being filed. If anyone in the company destroys documents after litigation is reasonably anticipated, for example, this could lead to harsh penalties by the court. Therefore, the company needs to know when to stop destroying documents.

Most companies have a routine time line for when documents are destroyed. There may be an official policy, or it may be what the IT personnel scheduled so that server space isn't quickly used up. Either way, know how to stop automatic destruction of documents quickly. Waiting a few weeks to implement a document retention policy could jeopardize your case and add unnecessary costs to the litigation.

Know Your Plan and How to Implement It

E-discovery doesn't have to be a litigation nightmare if you take measured steps to organize your company's electronic documents prior to the litigation rush. In fact, many companies that go through the process of electronic records review and management discover cost-cutting measures having little to do with litigation, such as the need to update old software or purge extraneous electronic documents taking up valuable server space. Developing a plan with assistance from your IT personnel, records management personnel, and litigation counsel now can save significant time and money once litigation arises. I encourage you to spend some time and prepare policies for your company's document storage

and retention so that in the event of litigation, you will have a policy that works smoothly, as inexpensively as possible, and without fear of sanctions.

Jennifer Bailey is an associate at Hovey Williams. You can contact Jennifer at jbailey@hoveywilliams.com.