



Guidance on Producing Electronic Discovery

Virtually every enterprise of any size has developed some kind of electronic document/email retention policy. Typically, it's created by the IT department, and ensures that these materials are adequately backed up and available. "Adequately" might mean 50 days, 30 days, even two weeks, depending on the business.

However, litigation changes everything. A business that doesn't properly preserve electronic documents when a lawsuit arises, or is even likely, will pay a serious penalty. The rules for handling electronic evidence in these situations are complex and fluid. They're also critical.

Let's begin at the beginning. You suspect litigation might be coming and you have emails and other electronic data stored in your hard drive and company server that could be relevant. What do you do with all this information? The hard truth is you must preserve it *even if your company has a document retention policy that would otherwise permit you to purge outdated documents including drafts*. Once litigation is anticipated, your company is required to alert all employees to preserve all potentially relevant information. The rules have changed.

If you do not preserve your electronic information, you open yourself up to real headaches. Courts have penalized parties for failing to make a complete production of electronic data. One penalty allows the other side to argue the inference before the jury that you destroyed evidence that was harmful to your case.

What do you need to do to produce electronic information requested in the litigation? You must identify all sources of possibly relevant information and diligently search them using terms sufficiently broad to capture anything potentially relevant. You may even be required to produce metadata, or the document's hidden data, including the document's modifications, date and time when the document was first created or edited and by whom. Your counsel will have to review this usually voluminous electronic information to ensure nothing privileged is produced. Producing privileged material could open up the argument by your opponent that the privilege has been waived and all information therefore producible.

Congress recently responded to the groundswell of complaints over the burdens of producing electronic discovery by enacting legislation in September 2008 that is intended to alleviate concerns about waiving privilege. The new Federal Rule of Evidence (Rule 502) provides that disclosure of privileged material does not waive the

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privilege if the disclosure was inadvertent and "reasonable steps" taken to prevent disclosure. While Rule 502 grants some protection, it does not eliminate the necessity and time-consuming burden of having to review voluminous email to ensure privileged information is not waived.

At a minimum, make sure your company has a document retention policy in place which requires all material information be preserved for the length of the statute of limitations periods in effect where you do business. Your policy will also need to contain a "litigation hold" for situations in which litigation is reasonably anticipated. We can help you prepare a policy that not only fits your business needs but also complies with your legal obligation. Remember – data storage is cheap. Litigation is not.



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