Deloitte.

exterro®

Deciding how and when to preserve corporate data

By Richard Vestuto, Managing Director, Deloitte Discovery, Deloitte Transactions and Analytics LLP.

Introduction

According to a recent Exterro survey, in-house legal and IT professionals deemed "deciding how and when to preserve corporate data" to be the fourth most controversial e-discovery issue in 2015, with 50 percent of respondents listing it in their top five. The topic was discussed as part of Exterro's Most Debated E-Discovery Issues webcast series in April 2016, on which I presented with Beth King, lead paralegal at Vestas. This white paper, in which we hope to add some clarity and supply some practical tips for managing the issue, is adapted from that discussion.

Questions concerning how and when to preserve data for a litigation or an investigation can sometimes be more complex that they first appear to be. There is often no bright line indicator for when an organization needs to start preserving data, other than "when litigation is reasonably anticipated," which is itself open to interpretation. Judges and courts around the country have used their own discretion to decide when preservation must occur, and their decisions are often dependent on the circumstances surrounding the case. Now though, the new Federal Rules of Civil Procedure (FRCP) rules appear to have generated more discussion surrounding defensible preservation tactics: collection, legal hold, or a hybrid method.

The trigger

Beyond the risk of spoliation, perhaps the biggest reason this question is so critical is the expense. Given the cost of labor, the cost of materials, and the lack of productivity, a big enterprise can spend a fortune going through an exercise that might never amount to anything. It is better to avoid the issue, if possible, so the first big question is when to trigger preservation efforts.

A conservative legal team might launch preservation too soon. "As soon as you make the decision to preserve data, it means work and expense, so it can be difficult to get buy-in from others involved," says Beth King, lead paralegal at wind energy company Vestas.

Unfortunately, the most commonly cited standard is quite gray. It places the obligation to preserve evidence to be when a party has notice that it is relevant to a litigation, or when they should have known. "When they should have known" is difficult to pinpoint. Since preservation is so expensive and disruptive, it is in a defendant's economic interest to start preserving later, in the hopes that the claim ends up being suspicious or perhaps even nonexistent. Meanwhile, plaintiffs often desire the process to start earlier, as driving up discovery costs, especially early in the process, may lead to a better settlement.

The amended federal rules

There was some expectation in the marketplace that the amendments to the FRCP, which took effect in December 2015, would address this issue, but they did not further clarify the standard. However, the amendments do have an impact in two areas: proportionality and reasonableness.

Amended Rule 26(b)(1) states, "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." Parties are only at risk for sanctions if they fail to take reasonable steps to preserve information in the first place, and the line is relatively clear.

This is having a meaningful impact on how and when companies preserve data, as companies now know they do not have to spend $5 million to preserve data on a $50,000 claim. "Frequently, we are dealing with … a case that is definitely going to be well under a million dollars. [Many] fall into the $300,000 to $500,000 range.... At least we know that we're not going to have to go through too many hoops to do the job right," says King.

The other area that has been impacted is reasonableness. Under the old rules, the court could go easy on a company if it took reasonable steps and may have missed something along the way. Companies can no longer claim ignorance; some understanding of the electronic discovery process is now considered reasonable to expect. Under amended Rule 37(e), a corporation that does not have a process in place could already be in trouble.

The expense

As previously mentioned, a big reason companies struggle with preservation is that it is so expensive, which ultimately impacts overall discovery and potentially settlement costs. So it is worth examining why the process is so costly and what can be done to combat the expense.

In February 2014, Professor William H.J. Hubbard of the University of Chicago Law School published his Preservation Costs Survey, which provides deep insight into how companies are meeting their preservation obligations and at what cost. Hubbard collected data from 128 companies ranging in size and spanning several industries.

Some of Hubbard's key findings include:

- Among the largest companies in the survey, the estimated preservation costs exceed $40 million per company per year.
- On average across all survey respondents, slightly less than half of all preserved data is collected, processed, and reviewed.
- For the largest companies in the survey, a 3 percent reduction only in employee time spent on litigation holds equates to a saving of more $1 million per year.

Similarly, 55 percent of respondents to polling questions on the Exterro webcast believed their organizations were overspending, a number that does not include the many who do not know what they are spending, either in hard or soft costs. “I think [my peers] know [what they spend] and the part that's really not always quantifiable has more to do with the other resources .... People should be dedicated to getting a job done, and now we have to pull them off to find data and that sort of thing. There is a lot of time spent and those costs usually are not tracked,” says King.

Companies are attacking these costs from different angles. They are implementing information governance protocols so they will have less data that they need to preserve. They are bringing in experts, often as a part of a managed service. They are working more closely with lawyers who understand preservation, including e-discovery counsel, which is becoming more and more prevalent in law firms and corporations, to build the argument to preserve less. And they are leveraging technology to deal with the enormous volumes of data they must manage. “We're doing more in information governance to tighten up our distraction policies, our preservation policies, and our retention policies so that there is a little bit less [to preserve]. As we look into this, we also find better ways to streamline access to certain types of data,” says King.

Three approaches to preservation

There are three different preservation approaches commonly used in discovery today:

01. A preserve-in-place approach.
02. A collect-everything approach.
03. A hybrid approach that combines preserve in place and collect everything.

An organization, in most circumstances, will not use the same preservation approach for all matters, depending on the organization and the circumstances surrounding the case.

Preserve in place

Preserving in place requires the distribution of a legal hold and asking people throughout the organization to maintain the data where it is. There are a number of advantages to this approach. It is relatively simple, requires minimal staffing, and the legal team can drive the process. This strategy, however, is not as defensible as imaging every drive, but the amended FRCP rules around proportionality may provide some protection. As such, 33 percent of poll respondents say they preserve in place for all matters and an additional 57 percent use it for some.

However, the legal team must also consider both the data and the sophistication of the custodians and ask, "Are we comfortable that they will and can do what we're asking of them?" This can be a factor especially for global organizations that have employees from other countries that do not understand discovery and preservation very well. As King adds, “They're big on the privacy aspect of it. That becomes a bit of a challenge.”

Leading practices

Should you attempt to preserve in place, make sure to not rely too heavily on technology and to focus equally on people and process. Consider the following leading practices:

- Take a top-down approach and get the general counsel involved, because a notice from the C-suite or a vice president carries the most weight in the minds of employees. Also, make sure to keep leadership apprised because people will e-mail them questions about how and why they must do things.
- Involve the IT security team to make sure you follow the right protocols for preserving and gathering data.
- Keep an eye out for employees leaving the company and involve local teams to ensure the data on their devices is preserved properly.
- Expect that your legal hold notice may find its way into discovery, so do not include anything that you would not want opposing counsel to see. But do include enough detail about the litigation so that custodians can properly preserve the right data
- If possible, meet with the custodians to make sure they understand what is happening (and see if you can find trouble spots, such as desktop backup devices that may have been forgotten).
- Consider using a technology tool to distribute the legal hold message and get confirmation that it has been received.

Collect everything

In the early days of electronic discovery, companies would preserve very broadly by imaging everything and then funneling it down. As time went on and companies got bigger and data volumes exploded, the idea of imaging thousands of hard drives became too cumbersome, expensive, and sometimes just not feasible. This approach also requires more involvement from IT, which sometimes creates conflict with the legal team. It is a defensible method, but considering the proportionality-related amendments to the FRCP, most matters probably do not require it.

However, many companies are conservative, and collecting everything is their preferred process. This approach is also common when dealing with regulatory investigations as the government frequently requires it. Collecting everything is starting to become less common, but there still are a significant amount of companies doing it. In fact, 69 percent of webcast poll respondents use this approach for at least some matters.

Leading practices

Collecting everything may be the best strategy in regulatory investigations or if defensibility is a concern. Consider the following leading practices with this approach:

- Collecting everything is expensive. Try to limit the scope to the extent possible.
- If this approach is being suggested by outside counsel, find out why and make sure that the recommendation is based upon the amended FRCP as well as your tolerance for risk.
- Preserving everything does not necessitate processing everything.
- IT professionals can drive the collect-everything mentality. Do not let their potential desire to use cool (to them) forensic tools drive your process—and drive up your costs.
- Nevertheless, some new technologies (e.g., spiders) can make this process much faster and cost-effective.
- Consider using analytics to look at the data on the network to better understand what will be required.
- Obviously, be sure to make forensic images that retain metadata to avoid spoliation.

Hybrid approach

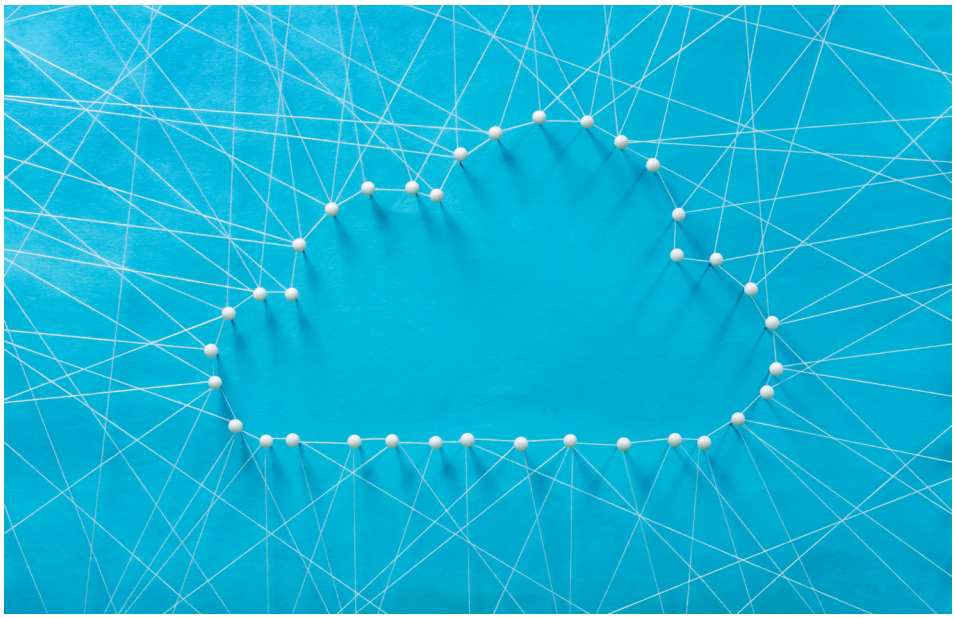
There is a happy medium between preserving in place and collecting everything, and it is the approach we most frequently recommend. Think about concentric circles. There is a core group of custodians that is at the heart of the matter. Those are people from whom perhaps everything should be collected. As custodians get farther and farther away from that center, the legal team can take a different approach. Organizing the custodians (or the data) into tiers allows different approaches to be applied to different levels.

From a cost perspective, the hybrid approach can be much less expensive than the collect-everything approach, but also somewhat more defensible than just preserving in place. As such, it is popular, with 79 percent of webcast poll respondents using it for some or all matters.

Leading practices

Consider the following leading practices when using a hybrid approach:

- Define a clear process.
- Communicate the process clearly with outside counsel as well as internal teams, such as IT.
- Legal and IT must be in synchronization. Otherwise, this approach may not be the best choice.
- Make sure the law department has enough in-house e-discovery expertise for this approach.
- Follow the best practices listed above as appropriate for each tier.



Conclusion

Regardless of the approach, perhaps the most important element when preserving corporate data is training and education. More and more employees throughout the enterprise now understand that litigation occurs in the normal course of business. But those same employees may not understand what to do with their data, and that can swiftly cause trouble.

At the same time, instilling good preservation practices around discovery can be an effective step toward better information governance practices enterprise-wide. As Vestas' Beth King says, "What we say to people is 'What are you putting in your e-mails? How are you communicating with people? How are you documenting what you're doing?' It has a dual functionality. It's educating people about discovery, but it's also about the best way to maintain records and communicate."

Contact

Richard Vestuto
Managing Director
Deloitte Discovery
Deloitte Transactions and
Business Analytics LLP
+1 212 436 2044
rvestuto@deloitte.com

Deloitte.