

## Easing E-Discovery

*A system for managing electronic records will avoid a production nightmare.*



BY JENNIFER U. BAKER

While electronic information has greatly enhanced the speed and proficiency of corporate operations, it has opened a Pandora's box of issues that have plagued corporate litigation and regulatory investigation response procedures.

Electronic records, if haphazardly managed, can expose a corporate legal department to compounded discovery costs and potential sanctions in a litigation or regulatory environment. In order to reduce such risks, it is important to understand how electronic documents differ from hard-copy documents.

**Creation.** Nearly all information communicated within a corporation is now created in an electronic format. Everything from correspondence to contracts, accounting ledgers, inventory lists, employee information, analyses, business plans, and all other corporate information begins with opening a software program.

**Detail.** When information is created electronically, the printable end product is not all that's discoverable. Embedded in almost every electronic document is a telltale history of the document itself, such as creation date, hidden notes, edits and changes, and other traceable information.

**Volume.** The increasing technical sophistication of even the smallest businesses make it easy to multiply exponentially one piece of electronic data. For example, e-mailing a draft document to a number of people for review can create a copy on the e-mail server, on the network server, on local e-mail archives, and on the hard drive for each recipient. Additional copies may be saved to personal organizers, PDAs, and home computers. This makes destruction of any document an uncertainty.

The large number of corporate mergers and acquisitions in recent years has also contributed to the volume and complexity of stored electronic data. Most IT departments simply integrate current systems and combine archive systems without appropriate purging or conversion.

**Backup.** For disaster recovery reasons, companies back up daily, monthly, quarterly, and/or annually. Companies typically

recycle these backup tapes according to retention plans, but they often store them indefinitely or fail to comply with stated destruction policies. As a result, electronic records may be discoverable long after they could have been destroyed.

### MORE COMPLEX

Companies that lack uniform classification and storage standards spend infinitely more time and money in producing electronic documents than their paper counterparts. Here's why:

- *Electronic records retention programs are insufficient or nonexistent.* Although most companies are changing their approach to records management, most retention programs are still largely geared toward the storage of paper and microfilm. Few retention policies provide direction as to the handling of electronic records.

- *Storage is haphazard.* Most companies maintain e-mail, word processing files, spreadsheets, and graphic presentations separately in nonstandardized filing systems. No two people file their materials the same way, so locating requested documents becomes a "Where's Waldo?" expedition.

- *Most organizations do not have a policy for categorizing, organizing, and inventorying electronic documents based on content, as they do for paper records.* Retention policies for e-mails, for example, are based on the media instead of the content—such as 30-day destruction policies. The result can be (and has been) considered by judges as reckless or intentional spoliation of evidence, subjecting the corporation to sanctions.

- *Corporate mergers and acquisitions are proliferating.* Consider the number of recent mergers and acquisitions—and currently there are more than 100 pending mergers valued at or above \$1 billion. Moreover, most merging companies will likely experience multiple mergers or acquisitions. Yet how often do M&A liability assessments include an evaluation of how the target's corporate records are maintained? More often than not, IT departments simply integrate current systems and combine archive systems. This complicates the restoration process when a

number of different types of software and hardware systems, as well as platforms, must be accessed to restore relevant media. Often, these systems and platforms are no longer supported by the organization, and the people who know how to retrieve them are long gone.

- *No external standards exist.* Although state and federal regulations mandate retaining certain records, these controls are limited to particular industries and types of documents. A set of standards (domestic or international) that provides standard nomenclature across all industries for all types of records (electronic or paper) would accomplish many goals. It would solve the indexing problems of systems personnel and the confusion caused by retention policies, transcend the challenges of corporate reorganizations and mergers, and facilitate the speedy location of electronic records for production.

Besides complexity, there are several reasons for the significant cost associated with electronic document production.

To start with, the company must identify where custodians keep—and have kept—potentially relevant electronic data. Custodians frequently store e-mail and other folders on various corporate servers, as well as in personal e-mail folders, hard drives, home computers, floppy disks, CD-ROMs, or personal organizers. This requires extensive research by network administrators, as well as valuable time spent by custodians and counsel.

If the relevant time period cited by the electronic document exceeds the “current” period, network administrators must determine if backup tapes exist for the identified servers. This could involve multiple backup tapes for the same periods of time (i.e., daily, monthly, quarterly, and annually). All of these must be reviewed for the custodian’s electronic documents. And that’s assuming the technology and expertise still exist within the company to access those tapes and retrieve the data.

Once electronic media are restored, the records must be reviewed for relevancy and privilege. Although such reviews are always costly, the volumes are increasing because multiple copies exist for virtually all electronic documents. Alternatives include reverting to a hard-copy review or investing in hardware and software for the electronic review—and both are costly.

If the production is to be performed electronically, redactions should also be made electronically. Once complete, the company will need considerable expertise, resources, and equipment to prepare the relevant electronic media for production. Ironically, there are still instances where the request mandates a hard-copy production. Then the company must print, catalog, and subject to quality review each electronic document before production. More courts are allowing electronic production of electronic documents, but this requires companies to invest in the technology to manage and support the process.

As in traditional productions, privilege and confidentiality logs are required for electronic productions. If done correctly, these can be generated from software programs that track the electronic documents during restoration. If manual logs are required, however, this will involve greater expense as the volume of electronic documents tends to be larger than that for paper.

Special hardware and software tools will be necessary throughout the production process to interface with backup tapes; restore electronic documents from the “interface” equipment; track and monitor electronic documents; review and redact electronic documents; produce privilege and confidentiality logs; and, ultimately, to track and produce the electronic documents. If voice media are included in the request, even more equipment will be required.

For large-scale electronic document productions, companies often need to establish facilities for the review and production of electronic documents, which means extra expenditures for staffing, leases, supplies, utilities, etc.

The resource requirements to retrieve and restore the electronic documents can cripple the day-to-day operations of a company. Even if resources are available within the company, the skill sets often do not exist because of outdated platforms and software. Additional resources may be needed, either full-time employees (who must be redirected from other projects) or consultants.

### **LIMITING EXPOSURE**

Considering the unknown risk and high cost of electronic document production, corporations should consider limiting these factors by proactively preparing for electronic production. The following steps can be taken long before a request for production is received.

- Assess the systems procedures for backup, storage, and indexing of data.
- Assess how to handle historical (up to 10 years) and prospective electronic records, based on the company’s records retention policy.
- Implement a clear and concise electronic records retention policy with appropriate compliance procedures.
- Define e-mail and electronic records in order to clarify that electronic documents are “corporate records” and are subject to retention policies, just as though they were paper.
- Assess the nature, both historical and prospective, of the company’s litigation matters.
- Develop procedures to follow in the event of an electronic production. Include a list of resources for technical and litigation support.

Collecting such information will help a company evaluate its current level of exposure and identify a course of action in the event of an electronic document production request. The costs will easily be offset by the savings realized when electronic document production occurs.

The challenges the corporate world faces regarding the management of its electronic information are real and costly. The majority of organizations are not prepared to respond effectively to an electronic document request. Advance preparation will save both time and money.

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