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Document Retention and E-discovery: What If You Get Sued (or Think You May Be Sued)?

by D. Lynne Watt

By now, most companies understand that electronic documents must be produced if a company becomes involved in litigation. However, it is long way from simply understanding the basic principle to actually being ready to respond if and when litigation arises.

Electronic Discovery: Definition and Scope

“E-discovery” refers to the location, preservation, review and production of documents from electronic sources. The statistics suggest that upwards of 95% of all newly created information is in electronic form and that the vast majority of electronic documents are never printed, existing solely in electronic form. It is clear that electronic documents now greatly exceed the number of hardcopy documents in any company.

The number of potential sources of documents is also significant and ever-increasing. In addition to checking on the main document server at a company, it is necessary to consider whether potentially relevant documents might also be located on individual computers, networked computers, laptop computers and even employees’ home computers. In addition to computers, there are PDAs, BlackBerries, pagers, cell phones, camera phones, iPods and memory sticks. In terms of office systems to be checked, there are word processing applications, document management systems, voicemail, e-mail, accounting records and various other

databases – perhaps including those of third parties, such as payroll system providers.

There is also a host of other devices that potentially create or store documents in electronic form, such as printers, digital copiers, scanners, fax machines, security systems, pass cards, surveillance tapes, biometric devices, black boxes in trucks and cars, GPS systems, memory chips in airbags and RFIDs used in inventory control systems. In a particular case, any or all of these might have to be searched for relevant documents, depending on the issues in the case.

And then there is, of course, e-mail. E-mail (and, more recently, texting) has become pervasive; even in the smallest of companies the volume of e-mail transmissions is significant. Assume each employee in a company receives and/or sends 100 e-mails a day: that’s 25,000 e-mails per employee per year, all of which may have to be searched if the company gets involved in litigation.

The Basic Legal Principle of Documentary Discovery

The requirement set out in the rules of court in common law jurisdictions is that “every document relevant to a matter in issue in an action that is, or has been, in the possession, power or control of a party shall be disclosed.” This is a broad definition, and is not limited to

documents that a party intends to rely upon to prove its case or to support its defence. Nor is it even limited to documents that are potentially helpful to either side in a lawsuit. Rather, it speaks to the fact that any document that is relevant to any matter in the litigation has to be identified in the party's affidavit of documents and, unless it is privileged, it has to be provided to the other side, if requested. This includes documents in electronic form.*

The obligation to preserve potentially relevant documents arises not merely in the context of actual litigation but may also exist whenever litigation is reasonably foreseeable – in other words, potential litigation. Once a company is put on notice (say, via a demand letter) that litigation is possible, then the onus shifts to the company to preserve and to secure potentially relevant documents. It is not sufficient simply to wait until a claim is served and then start the document preservation and collection process. Rather, if litigation is reasonably contemplated, then there is a positive obligation to take steps to preserve relevant documents and to make them available for production if and when litigation occurs.

This is a multi-step process. First, it is necessary to define the matters at issue in the lawsuit (or potential lawsuit), so that the universe of potentially relevant documents can be identified. This involves identifying the likely authors, recipients and/or custodians of documents in the company, again based on the identification of the potential issues in the case. Then it is necessary to preserve and, perhaps, to restore the documents (if they have been archived or created using an application that is no longer in use in the company). Preservation is often effected by sending hold notices to potential custodians of documents, alerting them not to destroy relevant documents.

Once the potentially relevant documents have been collected and preserved, the next step is to review the documents, so that irrelevant documents and duplicates can be removed and privileged documents flagged and segregated. Depending on the size of the document collection, this might have to be done with specialized searching and/or filtering software.

Finally, if there is a production request from the other side, then the relevant nonprivileged documents must be produced.

It is not always necessary to take all of these steps at the outset. The most important step is preservation, so that potentially relevant documents are not destroyed. Generally speaking, this should be done whenever litigation is reasonably contemplated. However, it may not be necessary to go beyond identifying and preserving potentially relevant documents. The remaining steps – restoration, searching and production – can be taken if and when litigation actually arises.

The Consequences of Failing to Produce

A party who fails to produce its relevant documents in response to a request for production from the other side may be subject to an Order from the Court to produce documents (with the attendant cost consequences). There is also a practical consideration, in that if you fail to produce your own electronic documents, it can become much more difficult to compel the other side to produce theirs, and you may want their documents in order to prosecute your claim or defend your position. Also, if you do not disclose and produce your documents to the other side, you will be prohibited from using them in evidence in the case or at the trial.

If a party to litigation does not take reasonable steps to preserve its relevant documents and make them available for production, that party may also be exposed to a claim for spoliation. Spoliation is a claim that a party either actively destroyed, or allowed the destruction of, documents that it reasonably knew or should have anticipated might be relevant in the context of litigation. If spoliation is proven, the court is entitled to draw an adverse inference that the documents would have been harmful to the position of the party that was guilty of spoliation. In effect, the documents that have been destroyed, even if inadvertently, can be used as evidence against the party who allowed them to be destroyed or who failed to take reasonable steps to protect the documents from destruction. This obviously can have serious implications for a party engaged in litigation and should be avoided if at all possible.

Therefore, if your company is engaged in litigation, or if litigation is likely, it is essential to get advice on the proper steps to ensure that the company's interests are properly protected in terms of complying with its documentary production obligations.

* Recent amendments to the Rules of Court in Ontario in effect January 1, 2010, have introduced a concept of "proportionality" in assessing to what extent documents have to be produced. It remains to be seen whether this will, in fact, moderate the often overwhelming impact of the documentary production obligations in litigation, particularly commercial litigation.