

The Duty To Preserve Electronic Data

By Judge Curt B. Henderson

Scene: *With the winds of investigation and litigation whispering, a loyal associate counsel disingenuously resurrects an often ignored 90 day email retention policy and sends a broadcast email "reminding" employees of its existence and instructing them to delete old emails. A week later, formal notice is received demanding the preservation of certain electronic data. The next day, the attorney informs the employees that "written notice and demand has been received" and instructs employees to preserve all "existing" electronic data. Forensic experts hired by the opposition are able to retrieve 'deleted' emails. The next several months are spent doing spin and damage control.*

What's wrong with this picture?

The ABA Civil Discovery Standards, issued in August, 1999, summarizes the prevailing rule:

"When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the consequences of failing to do so." Standard 10. Preservation of Documents, ABA Civil Discovery Standards, August 1999.

The duty to preserve documents applies with equal force to electronic data.

"A party's duty to take reasonable steps to preserve potentially relevant documents, also applies to . . . electronic medium or format . . . word-processing document [and] . . . email." Standard 29. Preserving and Producing Electronic Information. A. Duty to Preserve Electronic Information, ABA Civil Discovery Standards, August 1999

Rule 3.04 (a) of the Texas Disciplinary Rules of Professional Conduct requires that:

"A lawyer shall not: a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act."

In Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998) the Texas Supreme Court established that there is no independent cause of action for spoliation of evidence, stating that "...trial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions." Trevino, at 953 The concurring opinion by Justice Baker exhorted trial judges to take the issue seriously:

"Texas courts have been hesitant to apply remedies for spoliation. Evidence spoliation is a serious problem that can have a devastating effect on the administration of justice." Trevino, at 954

Whether there is a duty to preserve evidence is a matter of looking to statutes, regulations, the common law, and ethical considerations. Justice Baker's concurring opinion suggests that the duty to preserve in prelitigation circumstances arises "*when, after viewing the totality of the circumstances, the party actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation.*" Trevino at 956.

The scope of data covered by the duty is "*what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is likely to be requested during discovery, [or] is the subject of a pending discovery sanction*". Trevino, at 957.

Justice Baker's concurring opinion has been followed by several Courts of Appeals in Texas. Whiteside v. Watson, 12 S.W. 3d 614, (Tex. App. – Eastland 2000, pet. withdrawn by agreement); Clements v. Conard, 21 S.W. 3d 514, (Tex. App. – Amarillo 2000, pet. denied; In Re Dynamic Health, Inc. 32 S.W. 3d 876, 885 (Tex. App. – Texarkana, 2000, no pet.); Wal-Mart v Johnson. 39 S.W. 3d 729 (Tex. App. – Beaumont, 2001, pet. dismissed w.o.j.).

Prudent counsel seeking to obtain electronic data can formally trigger this duty to preserve by sending a 'notice' letter to the opposing party spelling out a request to preserve certain electronic data that might otherwise be deleted in the ordinary course of business.

On the other hand, if you are counsel anticipating having to respond to a request for electronic data, you need to clearly review the client's current retention policy. Selective destruction of data will generate suspicion unless there was a regular and consistently practiced retention and destruction policy. **Under any circumstance, once you reasonably anticipate litigation, all destruction of covered data should stop immediately.** Data is routinely deleted in the regular and ordinary course of business. Much of this destruction is done automatically by computer programs. Steps should be undertaken to prevent destruction until appropriate review measures can be applied.

It is important to understand that when a user 'deletes' files, the files are not necessarily unrecoverable. Until the file is 'overwritten' by another file, the 'deleted' file is still subject to being recovered. While there are special delete or erase programs which aid users in eliminating all traces of electronic files, the use of such a program to intentionally eliminate computer data may go to the culpability of the spoliator, depending on the circumstances. "*Important factors for the trial court to weigh include the degree of the spoliator's culpability...*" Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998)

Texas discovery rules have one slight, but important, element which distinguishes

them from the federal rules and the discovery rules in some other states; you must specifically request electronic data. While Tex Rule 192.3 provides that discovery may include electronic data, under Texas Rule 194.6 one must:

- 1) specifically request production of electronic or magnetic data, and
- 2) specify the form in which the data should be produced.

Unless you are familiar with computer terminology and technology, you might find it difficult to formulate your request, much less articulate it.

Depending upon the type of case, the importance of having a discovery plan that includes a search for the electronic source cannot be overstated. For an excellent discussion of the thresholds and burdens required to obtain discovery of computer data see *Computers and the Discovery of Evidence - A New Dimension to Civil Procedure*, 17 J. Marshall J. Computer & Info. L. 411. In addition, the Computer & Technology Section maintains an online resource devoted to the issues of Electronic Discovery and Computer Forensics at www.sbot.org.

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