PRESERVATION: Analysis

By Digital Discovery CLE Teaching Fellow Tom Brown

The common law imposes certain duties of data preservation upon all parties to litigation that are particularly salient in the context of digital discovery. Litigants are typically held to a reasonableness standard when delineating their duty to preserve evidence. Service of a complaint may put parties on notice of a duty to preserve potentially relevant evidence if they are sufficiently aware of what exactly the relevant issues are. *See* Bowmar Instrument Corp. v. Texas Instruments Inc., 25 Fed. R. Serv. 2d (Callaghan) 423, 427 (N.D. Ind. 1977).

At the same time, there are substantial benefits to obtaining an explicit judicial order of preservation. It is often difficult to determine whether a party behaved reasonably without a prior order specifying what reasonable conduct entails in the circumstances. In litigation involving Proctor & Gamble, one court held that, "[w]hile the duty to preserve evidence exists independently of court order, a court order would have delineated the scope of P&G's duties, provided clear evidence that P&G was on notice of the relevance of the e-mail communications, and furnished a standard by which this court could judge the adequacy of P&G's production efforts." The Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631 (D. Utah 1998). Since many courts have required a showing of bad faith or willful misconduct before sanctioning a party for spoliation, *see* Pressey v. Patterson, 898 F.2d 1018, 1021 (5th Cir. 1990), it would be much easier to demonstrate such conduct if the parties have explicit instructions as to what documents are subject to preservation.

In the digital arena, it is particularly difficult to distinguish between "reasonable" and "unreasonable" destruction of documents. For instance, if the respondents have a long-standing "document retention policy" by which they recycle backup tapes, a judge may find it reasonable for the backup tapes to continue to be recycled in the absence of a specific preservation order or discovery request. *See* Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 921, 48 Cal. Rptr. 2d 607, 625 (1995) ("good faith disposal pursuant to a bona fide consistent and reasonable document retention policy could justify a failure to produce documents in discovery.") Alternatively, a respondent in a discovery proceeding may elect to print out all relevant documents and continue with its standard tape-recycling policy. This is surely "reasonable," but, by destroying the electronic evidence, the respondent has eliminated all prior versions of the document and other data, found only in electronic form, that may have been useful to its opponents. These low-level bits may not be covered by the common law duty to preserve documents, but their preservation can be enforced by a specific order.

Furthermore, the question is not whether or not the respondent will destroy documents, but how much information the respondent can destroy without being accused of spoliation. Simply by using their computers on a day-to-day basis, the respondents are slowly destroying evidence. Naturally, no judge would order the respondents to cease using their computers, but an order to preserve, for example, backup tapes, deleted emails, old emails and any documents that have reached the end of their retention periods reaches at least some of our interests. Although a preservation order probably will not prevent a bad-faith attempt to destroy evidence, it will specify in clearer and broader terms than the common law dictates what evidence must be preserved.

A judge may well grant the order if he or she views it as relatively unobtrusive. The judge in *Linnen v. A. H. Robins Co.* issued an order requiring that the parties refrain from "discarding, destroying, erasing, purging or deleting any such documents including, but not limited to, computer memory, computer disks, data compilations, e-mail messages sent and received and all back-up computer files or devices." Linnen v. A.H. Robins Co, 10 Mass.L.Rptr. 189, *9 (Mass. Super. 1999). If the requested order simply restricts the erasure of backup tapes, a judge may see this as practically coextensive with the common law obligation imposed on a responding party, and is therefore less likely to find that the order is overly burdensome.

On the other hand, if the order is construed as interfering with the day-to-day use of the respondents' computers, a judge should be less willing to grant the preservation order. For instance, the order in *Linnen* may be objectionable on the grounds that, if read literally, no employee would be able even to use his or her office computer (or even potentially home computers used for business purposes): The order restricts the erasing of "computer memory;" yet it is impossible to use a computer without erasing its RAM. Furthermore, employees must be able to delete documents if, for instance, they run out of space on their drives, or if they want to install new operating systems on their computers, or for any of a thousand innocuous reasons. In this situation, it would be more useful to craft a more limited order that does not appear to interfere with the use of employees' computers, so long as relevant data is safeguarded. If the judge considers the motion for a preservation order to be in the nature of a request for a temporary restraining order and injunction, the judge could require a showing of potential irreparable harm before imposing any limitations on the defendant.

Prior to embroilment in litigation, corporate or in-house counsel should instruct their clients to initiate a document retention policy by which emails and deleted files are routinely purged. *See* Timothy Q. Delaney, "E-mail discovery: The duties, danger and expense." 46 Federal Lawyer 42 (January, 1999); Ian C. Ballon, "Spoliation of e-mail evidence: Proposed intranet policies and a framework for analysis. 4 Cyberspace Lawyer 2 (March 1999). When faced with a broad preservation order, as in *Linnen*, an attorney should instruct his or her clients to have an immediate meeting with their IT department. The client should suspend any backup-tape recycling program in place. If feasible, respondents should also make an immediate backup of all computers connected to the corporate network. Employees should be informed of the preservation order and instructed not to delete any "relevant" documents. With respect to email, employees should be permitted to delete their email, assuming that a full backup has been made of the mail server and that the company functions in a server-based environment. If the mail is stored on employees' hard drives, they should either refrain from deleting any messages or have their hard disks backed up before they delete items.

While these instructions may sound as though they'd be relatively simple to implement, we should not underestimate the enormity of this undertaking in at least some corporate contexts. Harry Baumgartner of BASF says: "The information is so widely dispersed, it is hard to get your arms around it. It used to be that all documents were in the basement, retained there in boxes. Now, we are facing the fact that essentially every individual user, by virtue of creating and keeping and NOT printing documents, has become a de facto record custodian. In this company, we have 15,000 employees. Every one has a computer. Two-thirds also have laptops. How do you capture all the information? How do you even search for it? That is the challenge -- trying to manage it and get out ahead of it before it becomes a huge problem."

On the whole, much uncertainty exists as to the bounds of reasonableness in digital discovery litigation. However, two strains run relatively consistently through the various cases: Requestors are well advised to seek an explicit preservation order as close to the commencement of litigation as possible to put defendants on notice of exactly which data may be relevant; and potential respondents would be wise to put into place a well-thought-out document retention policy *before* the threat of litigation to protect themselves against excessive discovery and against shouldering the high costs associated with it.