

## Article

# Effective Preservation Letters for Electronic Evidence

Since 90% of the world's information is stored as computer generated data, electronic discovery has become an imperative part of litigation. Billions of e-mails are being sent each day and more information is primarily (and sometimes only) stored electronically. When litigation occurs, evidence is most likely found hidden between the bits and bytes of electronic information. But the flexibility in today's computerized information era can just as easily work against you; data can easily be overwritten and purged. Time is of the essence when it comes to protecting short-lived log files that may be overwritten on a daily basis. You should send a preservation letter to the opposing party as soon as you expect litigation so that you can maximize the available information to help you prove your case.

If a company's document retention policy involves routine destruction of electronic documents, or continued use of pertinent electronic devices, then you need to act as soon as possible. Sending a preservation letter can, and often should, occur even before you file your case. When prompt action is taken, the opposing party will more likely be able to manage the electronic evidence better and make necessary preparations in response to the request for discovery. Rule 26(a)(1)(B) of the Federal Rules of Civil Procedure requires "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment."

To generate a preservation letter, you have to consider several factors. First, it is important to demonstrate your ability to comprehend how data is created, stored and deleted. Having that advantage would enable you to exhaust all possibilities of extracting electronic evidence in a preservation letter. The extent to which you succeed in your request for preservation depends on the type of electronic information being sought.

Data can be obtained in several forms: active data (currently accessible data from a computer), replicant data (data derived from electronic archives and automatic backups), residual data (deleted or unallocated data on a computer), and metadata

(data about electronic data that includes dates of creation, alteration, deletion, and who accessed the data, and from where, amongst others).

You also have to consider the electronic device that may contain the relevant data, and whether it resides on the home or work desktops, external drives, servers, laptops, backup tapes, etc. Once you identify the location, you should list the individuals that may be involved in the case, identifying them by name and/or capacity.

In addition to listing the location, types of data, and key individuals, the preservation letter should request that the opposing party suspend destruction of all possibly relevant data. This may involve ceasing routine document destruction, recycling of backup tapes, disk defragmentation or compression, and instructing employees to refrain from deleting documents until forensics copies of hard drives can be obtained by hard drive imaging (See feature article on page 1). The letter should also incorporate Rule 16 of the Federal Rules of Civil Procedure that mandates a duty to preserve the requested electronic evidence for discovery, and failure to respond to the request may subject the opposing party to court-ruled sanctions.

In composing the letter, you should anticipate issues that may elicit objections from the opposition. If you ask for “all data” to be preserved, the courts may object to such an overbroad request based on burden or cost. Furthermore, under Rule 26(b)(2) of the Federal Rules of Civil Procedure, the court can limit discovery if the discovery is “unreasonably cumulative...obtainable from some other source that is more convenient, less burdensome, or less expensive” or if “the burden or expense of the proposed discovery outweighs its likely benefit.” Therefore, when requesting preservation of data, be specific and identify specific individuals and request that any storage media for those individuals be imaged. This will help focus your search and not encumber the opposing party with an undue burden of finding all data. It is crucial to remember that anything you ask of the opposing party can be asked of you!

Finally, deploy a third-party electronic discovery expert early to help you understand the fundamentals of obtaining electronic information. When choosing an expert, consider one who can provide a myriad of services, from composing the preservation letter to serving as an expert witness during trial. Preparing for electronic discovery may seem a laborious task, but understanding the course of action well and hiring the right experts is certainly a step in the right direction.