

Preservation plan

Discovery of electronically stored information poses significant risks

In a lawsuit's discovery phase, each party must turn over to its opponent documents and electronically stored information (ESI) that could be used as evidence. Discovery of ESI poses significant risks for unwary businesses. That's because the obligation to preserve the ESI that is potentially relevant to a lawsuit can arise well before the lawsuit is filed.

"The first time that management thinks about ESI preservation should not be after one party to a dispute runs to court," says Andrew P. Shelby, a litigation associate at Novack and Macey LLP.

Smart Business spoke with Shelby about what businesses should be doing when the duty to preserve is triggered in order to protect themselves from facing substantial consequences.

What is ESI?

ESI is data stored in any electronic medium. For many businesses, email constitutes the most significant form of ESI. But it is not the only form. Increasingly, businesses' ESI includes text messages, instant messages and social media. It also includes voice mail, photographs, databases and office documents such as Microsoft Word, PowerPoint and Excel.

Courts trend toward inclusiveness in determining whether data forms constitute ESI. So, as new office platforms and digital-communication formats emerge, they will likely be considered ESI.

What is the duty to preserve ESI and when is it triggered?

The duty to preserve is the obligation

ANDREW P. SHELBY
Litigation associate
Novack and Macey LLP

(312) 419-6900
ashelby@novackmacey.com



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to prevent the destruction or alteration of ESI that may be used as evidence in litigation by either party, including a business's opponent. In general, the duty to preserve arises when litigation is reasonably anticipated — i.e., when it would be reasonable for a business to foresee that it may either sue or be sued.

What do businesses need to do to comply with the duty to preserve ESI?

Retaining a lawyer experienced in ESI discovery is the first thing that a business should do when anticipating litigation. With the lawyer's assistance, the business must then identify the 'universe' of ESI potentially relevant to the anticipated litigation. Doing so will involve identifying the custodians of that ESI — e.g., the employees involved in the dispute — and determining where they store ESI.

For example, their ESI could be on the business's server or in its cloud storage. It could also be on employees' computers, smartphones or tablets. The business then needs to instruct the custodians to not destroy any ESI that may relate to the litigation. This instruction is typically communicated through a 'litigation hold' letter. The business also should disable any programs that automatically delete ESI on a periodic basis.

What are the consequences of failing to comply?

The worst-case scenario is losing the case automatically as a sanction. Courts can also impose severe monetary fines. One litigant recently received a fine of almost \$1 million.

Nonmonetary sanctions are also possible. For example, the court could instruct the jury to make an inference that the ESI destroyed in violation of the duty to preserve must have harmed the legal position of the party who destroyed it.

What are some steps that a business can take to proactively prevent violations of the duty preserve ESI?

Developing an ESI-preservation plan that is followed when the duty to preserve is triggered can prevent many problems. The plan should include procedures for identifying custodians, disarming automatic deletion functions and training employees about preserving ESI if they receive a litigation hold letter, among other things. If a business has legal and IT departments, the discovery plan should be a joint effort between them with the help of counsel versed in ESI discovery. The plan should also require periodic coordination between IT and legal departments about ESI creation, use, storage and deletion so that changes are taken into account. ●