

## The Legal Intelligencer

# A Refresher on Core Components of Discovery and Information Governance

In this article, we focus on the basics of the preservation and collection of records, the central principle of proportionality, and the importance of cooperation during discovery.

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At the start of the pandemic, law firms underwent a rapid and significant change by transitioning to a fully remote work environment. Change like this can cause us to lose sight of the fundamentals that have made us successful. As law firms begin planning for partial or full office returns, now is a good time to get back to the basics. For e-data attorneys, a refresher on the core components of discovery and information governance practice might be a good place to start. In this series of articles, we'll revisit some of the principles that undergird our practice. Some will be lofty, such as Federal Rule of Civil Procedure 1's admonition to "secure the just, speedy, and inexpensive determination of every action and proceeding." Others will be practical, reminding us, for example, that information still needs to be relevant to be discoverable, no matter how complex the process or technology we use to surface it. We aim in this effort to remind ourselves that what we e-data lawyers do still depends on why we do it.

In this article, we focus on the basics of the preservation and collection of records, the central principle of proportionality, and the importance of cooperation during discovery.

As technology used for e-discovery advances and practitioners become more specialized and tech savvy, some may think the basics are too simple to be too important. Basketball provides a telling example of why the basics remain important. Larry Bird is considered by many as one of the greatest players in NBA history, but he acknowledged that he was not one of the fastest or strongest players on the court. Bird attributed his success to his adherence to the fundamentals of the game. Understanding and applying the basics are crucial to one's initial and continued success in any profession. We have all heard the saying that championship teams do all the small things well, and this applies to the best e-data practices too.

Some lawyers may not think much about preserving records until discovery begins in earnest, but this is an instance where the basics undergird the defensibility and success of the entire discovery process. There are three core considerations for preservation: when to preserve, what to preserve and how to preserve.

Keep in mind that as discovery proceeds any sloppy preservation practices will likely surface and draw scrutiny from opposing counsel, and even the court. Reasonable preservation practices will foster trust with the opposing side and promote cooperation.

Although discovery starts after the filing of a lawsuit or notice of an investigation, preservation obligations often begin well before these events. Organizations have a duty to preserve evidence when they know or reasonably should know their records may be needed as evidence in actual or potential litigation, an investigation, or some other legal proceeding. Although this sounds like a straightforward standard, it can be tricky to apply in real-world situations. Assessing when a duty to preserve is triggered is fact intensive. If it appears likely your client will be subject to litigation or is planning to initiate litigation, you must begin seriously thinking about preserving evidence. The existence of a dispute may not be enough to trigger the duty, but the duty can arise before a lawsuit is filed or threatened. As one court aptly explained, the duty to preserve arises "somewhere between knowledge of the dispute and direct, specific threats of litigation." In many cases, there is no clear signpost spelling out when to preserve evidence, but if you are not looking you can miss the signals that a duty has been triggered.

After this duty arises, organizations must take steps to preserve relevant information. Perfection is not required, but organizations must demonstrate that they have acted reasonably and in good faith. This requires a full understanding of your client's data sources—the locations where potentially discoverable information resides—and the key custodians who hold the relevant information.

In many instances, over-preservation for legal matters will conflict with data minimization principles imposed by these new privacy laws. The scope of the duty to preserve is coextensive with the scope of discovery. Always keep in mind that proportionality should be your guiding principle. Only information proportional to the needs of the case must be preserved. Knowing the facts of the case and how your client maintains its data will help you strike the right balance, preventing over-inclusive and under-inclusive preservation efforts.

Don't underestimate the importance of the legal hold notice. Issuing a legal hold is not a perfunctory exercise where you can simply copy and paste boilerplate legalese. Overcomplication will lead to confusion and lost data. Legal hold notices should plainly tell custodians what their obligations are and give them clear instructions on how to meet those

obligations. This requires an explanation of the scope and subject matter of the hold, including relevant dates and potential locations where relevant materials may reside. Don't forget the small things. If custodians will need to take actions to preserve materials such as disabling janitorial functions or backing up text messages, tell them exactly how to do it. Importantly, inform the custodians that there can be consequences for them and the organization if they fail to comply with the legal hold.

In general, a legal hold is most effective if it is monitored for compliance. A best practice is to have custodians verify they have received the notice, understand it, and will comply with the instructions. Sending regular reminders to custodians about the hold and providing trainings on legal holds also improve the effectiveness of preservation efforts. If, as mentioned above, you are relying on custodians to affirmatively stop routine data destruction, it is a good idea to verify they have followed instructions.

Document your preservation efforts. Track the issuance of the hold, custodian acknowledgements of the hold, and any monitoring actions. Good documentation practices will help you establish a defensible process.

Once a hold is issued, you need to decide if and when to collect the data. Proportionality and reasonableness also should guide how records are preserved. There is no one-size-fits-all approach. The method of preservation depends entirely on the circumstances. Data can be retained where it is kept in the ordinary course of business (preservation in place) and only collected when needed for future discovery, or data can be collected immediately to ensure preservation. Preservation in place is not as costly as collecting to preserve because the records are retained where they would otherwise be kept. However, this method relies on the cooperation, competence, and good faith of custodians. Preserving in place is often a reasonable choice, but it imposes heightened monitoring obligations.

Preservation by collection can be impractical and expensive if there are numerous custodians or if relevant data will continue to be generated during the life of the legal hold. However, collection at the start of the hold reduces the risk of losing relevant data. Although there is no per se rule on how to preserve records, if an organization knows or should know that there is a risk of data being lost if it is retained in place, it should take steps to collect that data. This is especially true when a custodian is a target of an investigation or suspected of misconduct, or if there is any other indication the custodian may destroy or lose data.

When collecting data for preservation, be sure to understand where the custodians are located. For many organizations, it is common for legal holds to include custodians located in the United States and around the globe. Collecting data from foreign countries will likely implicate a range of data privacy laws. Just because the data is not yet being processed and reviewed for production does not mean you can ignore applicable data privacy laws.

Don't forget to keep track of your custodians. During a legal hold, depending on the number of custodians, there is a very good chance some custodians will leave their positions. You need to have a process in place to identify when these custodians are leaving and to capture their data before it is lost. In many instances, it may not be feasible to interview a custodian who has given a short notice. This may require imaging computers and mobile devices and confirming that email accounts will not be deleted after the custodian becomes an inactive employee. If you do the

small things well with the preservation of records, your client's interests will be protected, and you will be well positioned for the start of discovery.

When discovery begins, understand and apply the basic rules of civil procedure. Just like the baselines and sidelines set the boundaries of a basketball court, Rule 1 sets the boundaries for discovery. Rule 1 is the master rule and requires all the other rules of civil procedure to be applied to obtain efficient, fair, and economical outcomes. However, broad discovery rights granted by other portions of the rules, the corresponding expense of producing information, the adversarial nature of litigation, and the personalities of some litigators often create substantial tension with Rule 1's lofty principles.

In 2015, Rule 1 was amended to expressly require the parties, not just the courts, to employ all the rules of civil procedure to meet these same goals. Rule 1 only works if discovery is treated as a cooperative venture. Because the court cannot referee every discovery negotiation between the parties, lawyers must cooperate, or their case will devolve into a series of time-consuming and costly squabbles.

Cooperation involves reasonableness. Zealous advocacy does not require you to say no to everything, and cooperation does not require you to concede every point. There is a balance in every case. In approaching discovery, be willing to listen to opposing counsel and understand their viewpoints. You should be ready to explain your positions clearly and educate your opponent. Misunderstandings can fuel unnecessary disputes. In many instances, disputes can be limited or resolved when the parties fully understand what the other side needs and why they need it.

The rules of civil procedure require parties to meet and confer regarding numerous issues, including preservation of records, the form of production, and assertions of privilege. When an unresolvable conflict arises, before seeking court intervention, the parties must certify they have undertaken good-faith efforts to resolve the dispute. Good faith necessarily requires reasonableness on each side, and courts can easily discern those who have not behaved reasonably in discovery. Although cooperation may seem unnatural during an adversarial process like litigation, it now is a fundamental principle the parties must embrace and practice during all phases of discovery.

In our final installment of the year, we will get back to other e-discovery basics, including the concepts of relevancy and uniqueness, and privilege log fundamentals.

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