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LITIGATION HOLDS

The authors discuss the risks that attach when de facto “permanent litigation holds” are inadvertently created.

Closing Matters and Releasing Data: What Are We Afraid Of?

By JAMES L. MICHALOWICZ AND JULIE RICHER

Since the Federal Rules of Civil Procedure were amended in 2006, much has been made of the need to implement effective document preservation strategies in order to avoid spoliation claims or other sanctions. Companies are improving every day at implementing litigation holds and maintaining potentially relevant documents outside of regular retention and destruction programs in anticipation of litigation.

Most companies, however, do not have a process for releasing those holds after a case is closed and litigation is no longer anticipated. “Permanent” litigation holds add risk—as documents that could have legally been destroyed may become dangerous in a future matter—and costly in terms of storage space, backups, and potentially even additional document review.

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The Problem. There are two basic tenets of pre-trial practice: 1) all relevant information must be preserved from the time litigation can be reasonably anticipated and 2) during discovery, each party must produce all relevant (unless privileged) documents to opponents.

Once a matter ends, however, all evidence can be released—unless it is subject to a litigation hold in another matter. Automatically retaining all data from all cases after their resolution can be a mistake, as those databases might become sources of evidence in future matters, which would need to be searched anew, often unnecessarily.

An Hypothetical. Consider a matter related to the imaginary drug Litigex. A proper data collection might include preservation of an e-mail from Dr. Allen to Mr. Bates, possibly including some messages that also discuss a different over-the-counter drug, Discover-Ease, which is not part of the Litigex or any other anticipated matter.

Now imagine the Litigex matter concludes, but the discovery data related to it is retained, and the company is later sued over Discover-Ease. Under these facts, the company is responsible for producing relevant data from the Litigex deposit of data.

At minimum, it must pay to search through all the Litigex-related collections, process the potentially relevant, and cull, review, and produce those documents.

This is not only costly, but rife with risk of sanctions if overlooked. Forfeiting the opportunity to destroy files of matters that have concluded as part of the company's regular retention policy could prove extremely costly.

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DAVID A. CHAUMETTE
DE LA ROSA & CHAUMETTE

Credibility. Furthermore, not having a process for closing matters can cause credibility issues. The deficiency could lead managers to question the value of the overall records retention program.

If residual data from a closed matter becomes part of a current production set, judges and adversaries might start wondering what else might still exist and ask for more data from other prior matters. (This can be especially dangerous if the data resided at a law firm or other third-party.)

And finally, it is important that all employees responsible for records retention and litigation feel confident they are being honest when responding to a protective order. A variety of “data deposits” does not breed this confidence.

Costs. Even more worrisome than the risk, however, is the additional cost related to keeping excess data. Data not released from the discovery collection pool takes up server space. The amount of data on backup tapes (and the expense of buying more tapes) continues to grow, as does the time it takes to back up data, which takes up network resources.

Once a case ensues, this pool of data must be reviewed and produced. Even in cases that are not too costly, redundant and repetitive collection and review costs are wasteful. And some of this work, such as data related to custodians no longer with the company, can be extremely difficult and expensive.

So Where is This Data? As a company goes through discovery, it creates “data deposits” at various steps in the process. Many times data moves from the corporation to a service provider to a law firm and back, with copies made at each site.

The number of data deposits will vary depending on the use of outside counsel and the use of a processing vendor. Some companies do more work in-house than others. The more parties involved in a matter outside the corporation's walls, the more data deposits it will have.

“For professional basketball players, the more ‘touches’ they get, the happier they are,” observes attorney David A. Chaumette of Houston's De La Rosa & Chaumette. “But like in basketball, in discovery, more touches may not be the best thing for your team.”

In fact, there are numerous risks of leaving these “deposits” during each phase of discovery:

Identification

- Data is with custodians on hard drives, network drives, paper, voice-mail, and removable media.
- Data is in applications used by the corporations.

Collection

- Data is copied from custodian sources and when possible out of applications to a secured server site where it is locked down for safekeeping (with the amount of data varying greatly depending on the matter and company.)

This creates potential Data Deposit 1.

Analysis

- Sample searches are run on the total data set. Results are saved on secured server.

This creates potential Data Deposit 2.

Processing

- If the data set is large, it needs to be processed (deduplicated and load file creation for review tool) by a service provider, who now has a copy of data.

This creates potential Data Deposit 3.

- The processed data set is provided back and loaded into a review application. Typically a copy is made of this new data set before review begins.

This creates potential Data Deposit 4.

Review

- The data set is reviewed and “tagged” for production. **This creates potential Data Deposit 5.**

- If outside counsel is engaged, they typically review a set of this tagged data prior to production processing. **This creates potential Data Deposit 6.**

Production

- Tagged data set is sent to service provider for production processing, such as tiffing, Bates stamping etc. **This creates potential Data Deposit 7.**

Building a Solid Matter Closing Process

1. Acknowledge that a “closing” phase should be imbedded in the EDRM process.
2. Identify an “owner” of the discovery-case closing step; a litigation paralegal may be a good candidate.
3. At the onset of discovery, create an inventory along with chain of custody for each document/data collection/deposit.
4. Ensure that each collection/deposit is catalogued and preserved in a retrievable format.
5. Upon initiation of the case closing process, determine if there is an applicable protective order that requires proper disposition of the data collections/deposits; if yes, provide instructions to each owner of proper disposition.
6. If no protective order exists, determine if data is subject to a hold related to another matter. If not, request that counsel sign off on release of legal hold, contact company custodians regarding release of hold and owners of discovery collections/deposits to implement guidelines for proper disposition.
7. If the closed case is part of serial litigation, determine if a records hold is continued in current state and if so, ensure preservation of data collections/deposits; also determine if any of the original deposits of large snapshots can be disposed.

■ A copy of the production CD is provided back to the corporation and, if outside counsel is being used, a copy is provided there as well.

This creates potential Data Deposits 8 and 9.

■ A copy of the production data provided to opposing counsel.

This creates potential Data Deposit 10.

While there is risk associated with any of these data deposits, it is important to be especially wary of deposits created earlier in the process. As each step in the process removes documents irrelevant to the matter at hand, later deposits are less likely to include documents related to a wholly separate matter.

Managing Data Deposits. Returning to the pharmaceutical example, an e-mail from Dr. Allen to Mr. Bates stating only, “Please see me immediately about Discover-Ease side effects” would likely be removed from the Litigex data set during analysis or production, but might remain in a data deposit created during the collection phase.

In order to better manage the risk of data deposits, a company might choose to keep all its data deposits clearly marked in one place in an organized manner. This enables clean-up without compromising retention obligations for other matters—or at least provides for

easy access should retained data need to be reviewed later.

One area worth special mention is data deposits that remain at law firms, service providers, co-defendants or other third parties, since the client does not have full control over that data. There may be some give-and-take in getting third parties to properly close matters. It might be worthwhile to understand their data retention policies prior to sending over the data to ensure they will be able to delete data as requested.

Defending the Process. Adding a new process at the end of litigation may require writing a business case.

“Many litigation attorneys cannot stay within budget, so adding another task to a matter that may already have taken up more time and money than expected may not be popular,” Chaumette points out.

But keeping data after a matter is closed is costly and dangerous. Conversely, simply releasing a litigation hold without a documented and detailed process is a prescription for a spoliation claim.

It is important to understand the risks and costs associated with permanent litigation holds, build a rationale for releasing holds when appropriate and outline a process for defensibly closing matters and releasing data.