



- Preservation of Discoverable Documents
- Protecting Confidential Information

## Preservation of Discoverable Documents

Congress recently promulgated sweeping changes to the Federal Rules of Civil Procedure designed to address the complex issues surrounding electronic information storage. The obligation to preserve documents during threatened or pending litigation has not changed. What has changed is the willingness of courts to impose dramatic, even draconian, sanctions when documents requested in discovery turn out to have been destroyed.

This development is the result of the evolution of technology. Much data is now stored electronically. It is very easy to delete emails and other stored data; and electronic information systems are typically programmed to automatically destroy stored data according to some preset cycle.

It is therefore more important than ever to instruct everyone connected with custodial responsibility for documents, whether in hard copy or electronic form, once litigation is imminent or is commenced, to override destruction commands, preserve backup tapes, and assure that emails and hard drives are secured and preserved.

The manner in which notification takes place will, of course, vary from company to company. It is important to document the fact that notice has been given. If you wish to review some of the recent court decisions in this area which have triggered our concern, please do not hesitate to contact us for the cites.

Please contact the following person for guidance regarding these issues:

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## Protecting Confidential Information

Until recently, courts routinely signed protective orders authorizing documents or testimony used to support motions to be filed under seal. This is no longer the case. Both federal and state courts have become highly sensitive to constitutional and common law mandates to honor the fact that we have an open, and not a secret, court system.

In practice, this has made little difference in agreements between and among parties to a lawsuit to keep materials produced in discovery confidential. Courts are still signing such protective orders with a simple showing of good cause. The fact that information is considered to be a trade secret or sensitive business or financial information is typically sufficient to

demonstrate that good cause.

Current practice, however, has made the continuing confidentiality of such information when used to support motions in a lawsuit problematic. In order to protect such confidential information either by sealing documents or redacting sensitive portions of documents, the party seeking to protect the information must demonstrate a compelling reason to overcome the presumption in favor of public access. An order sealing or redacting documents is now necessary before the documents can be used in a summary judgment motion or other motions. In order to obtain a motion to seal or redact, a party must make a specific showing as to each document that is intended to be protected. This motion to seal will typically need to be supported by declarations from persons with first-hand knowledge as to why the information is sensitive and should be protected. A hearing will usually be required and the stipulations of the parties simply will not be sufficient to demonstrate the compelling interest.

When confidential information has been obtained from third parties in the litigation, a show cause hearing with notice to those parties will be required before any documents they produced can be protected by sealing or redaction.

Additionally, when third parties such as newspapers or public interest groups make motions for access to confidential information, a hearing will be required and, again, a document-by-document review will be necessary to determine whether those documents should remain sealed or become public information.

The result is significant added expense. Much closer attention is necessary to scheduling deadlines so that time is set aside in advance of key motions which are going to rely on confidential information. Most importantly, these new procedures interject a significant degree of uncertainty as to whether or not confidential and sensitive information can in fact be protected in litigation. Thus, one more ancillary factor must now be given due consideration when litigation is contemplated or confronted. In negotiating contracts where breach or disputes will inevitably involve confidential information, serious consideration should be given to private arbitration clauses. Confidential information can then be protected by agreement.

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