

# Keep your records safe

The importance of storing records electronically **Interviewed by Chelan David**

**T**he recent amendments to the Federal Rules of Civil Procedure highlight the importance of having document-retention policies in place that take into consideration electronically stored records and data. In order to ensure that necessary information is preserved and can be produced in the event of litigation, it is critical to institute a corporate policy relating to e-discovery.

“Defining record-retention protocols in advance and not waiting until after a lawsuit has been filed is the classic avoidance of locking the barn door after the horse gets out,” says John Mitchell, an executive partner at Secrest Wardle. “It protects the credibility of the company, and it protects against the potential imposition of sanctions.”

*Smart Business* spoke with Mitchell about e-discovery and the importance of being proactive in respect to record-retention protocols.

## What effect has e-discovery had on litigation?

We can look at this from two perspectives: the first is technical and the second is practical. Technically, new rules have been established that codify the fact that e-commerce is the order of the day and that electronic storage of documents now predominates. As a practical matter, these rules expand what can be done in discovery, and they create mechanisms for companies to be exposed to what heretofore had been undiscovered internal communication. Sometimes that is a great benefit to someone going through litigation, and sometimes it's a potential detriment.

## What are the recent amendments to the Federal Rules of Civil Procedures in regards to e-discovery?

It's important to recognize that the rules have been around for decades, long before most people had ever heard the word computer. On the other hand, computers dominated companies' operations for many years before the rules were changed on



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Dec. 1, 2006. The amendments define the capacity and the ability to request and obtain documents maintained electronically. The rules also provide very significant requisites for meeting and conferring among counsel prior to the initial mandatory conference with the court. Discussions need to include what is electronically stored, how data may be retained and specific protocols defining not only where these documents are but what can be produced and how.

## How have these changes affected the manner in which parties handle written discovery?

At a baseline level, litigants start out with their preliminary requests for production, seeking specific information regarding what is maintained electronically and asking that documents be produced. Creative attorneys can expand their request from the traditional request for someone's files to asking for what is stored on hard drives, what is available through servers on either the sender's or recipient's side and what might be available through the ISP server. The expanded availability of what can be asked for and the permanency of what is electronically stored has redefined the scope of what can be requested.

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On the other hand, historic protections and rules for discovery have not changed: The fact that written requests are more expansive than in the past doesn't change the ability to object on the basis of relevancy and privilege.

## Why is it so important to institute a corporate policy that addresses the use and retention of electronic information?

What is in your documents so often defines your potential liability or your defenses. Unlike in days gone by, when everything you had was simply in the filing cabinet, the existence and capacity of anything stored electronically to remain permanently part of your file requires that you have a policy to protect how documents are created, who has the authority to memorialize information on behalf of your company and for how long that material is going to be retained.

## How can CEOs and senior-level management be proactive in regards to record-retention protocols?

Management needs to work with counsel, whether it's corporate counsel or retained counsel, to set up policies and define how document management is going to occur. The system needs to be reasonable, have a systematic approach and a clear definition of how the company is going to define their business needs and how it is going to meet legal requirements.

As to the latter, and even if it needs to be done by something as basic and fundamental as a literal checklist, there must be a definition put in place that defines when legal requirements create the need to retain documents that otherwise would be disposed of. This requires somebody with authority to define what immediate action needs to be taken, when requisite notice of impending or potential legal action comes in, and what steps will be taken to maintain the integrity of what is retained.

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