

E-DISCOVERY QUIZ

The digital revolution has made companies more efficient and cut down on paper work, but from a litigation standpoint it's exposed them to a growing tide of legal issues when it comes to discovery. Take our quiz — authored by WeirFoulds LLP partners Marie-Andrée Vermette, J. Gregory Richards, and Frank E. Walwyn — and see if you are up to speed on where the law around e-discovery is heading.



- 1** When preparing for potential litigation down the road, one key proactive step a company can take to reduce the costs of litigation is which of the following?
- a) Ensure every document ever created or received by the company is readily available for the company's litigators, organized chronologically.
 - b) Merge all of the company's electronic documents into one large database so there is only one central place to look when preparing for the production of documents.
 - c) Distribute a copy of "instant evidence eraser" software to every key employee with instructions to activate it when needed.
 - d) Have in place an up-to-date document retention policy.

2 A good document retention policy should never permit the intentional destruction of documents. True or False?

3 You are served with a statement of claim that contains allegations about a particular employee. That employee is away on holiday and, after obtaining the employee's password from one of your IT persons, you decide to turn on the employee's computer and start looking at his documents and e-mails in order to determine whether there is any substance to the allegations made in the claim. Is this a safe way to proceed from an e-discovery perspective?

4 As in-house counsel you receive a "legal hold" from external counsel requesting that you preserve documentation, including all electronic documents, relating to a dispute that has recently arisen. You are careful to forward this legal hold to all the key players in your company that had anything to do with matters relating to the case. You emphasize how important it is for each of them to preserve relevant documentation. Have you discharged your obligations?

5 Your company is involved in a complex piece of commercial litigation. After collecting hundreds of thousands of electronic documents from employees who are reasonably likely to have documents that are potentially relevant to the litigation, you prepare a list of search terms to be applied to the set of electronic documents in an effort to identify: (a) relevant documents to be produced; and (b) privileged documents. The application of the search terms reveals that 75,000 documents contain a relevant search term and do not contain a privileged search term. Would producing the 75,000 documents to the opposing party without taking any further steps fulfil your discovery obligations?

6 A court finds that your company has failed to make full disclosure of electronic documents in a case. Judging from experience in the U.S., sanctions against your company may include which of the following?:

- a) An order precluding your company from calling a fact or expert witness at trial.
- b) An adverse inference being drawn against your company (i.e. it will be assumed the electronic documents that cannot now be produced would not have assisted your company's position).
- c) A costs order against your company.
- d) Your company's action being dismissed or its defence being struck out.
- e) A finding of liability against your company.

See answers on next page

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ANSWERS

1 (D). A sound document retention policy, tailored to address the specific needs of an organization, is one of the best steps a company can take to reduce the costs of litigation. Such a policy should be reasonable, realistic, and practical, and will address, among other things, how documents are accessed and stored, when and how documents should be destroyed, and how documents will be handled when litigation is threatened.

2 FALSE. Unless there is a specific legal (e.g. regulatory) requirement that prevents the destruction of documents, a company is entitled to destroy documents which have no further value to it. This is particularly true if the destruction is performed in accordance with a valid document retention policy. In the infamous Enron saga, Arthur Andersen got into trouble for shredding Enron-related documents in the face of an impending investigation. In overturning Arthur Andersen's felony conviction, the U.S. Supreme Court remarked, in obiter: "Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the government, are common in business. . . . It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." (*Arthur Andersen LLP v. United States.*)

3 NO. The simple fact of turning on a computer or opening a file may have the effect of altering metadata, i.e. electronic information that is recorded by the system about a particular document concerning, for instance, its format, and how, when, and by whom it was created, saved, accessed, or modified. Although metadata does not need to be preserved and produced in all cases, consideration should be given to its relevance prior to taking any steps that could alter it. In this particular example, the integrity of the metadata could be preserved by having a forensic copy made of the employee's hard drive.

4 NO. Upon receiving a legal hold, a thorough analysis has to be conducted and a number of steps taken depending on the nature of each case. It is likely that your company's records management and data retention policy must be adjusted immediately (e.g. the destruction of any electronic data relating to the case pursuant to the policy must stop). You will have a duty to become familiar with your data retention policy and the architecture (both hardware and software) of your document systems. In addition to forwarding the legal hold to the key players, you will have a duty to communicate directly with them and to

monitor compliance with the legal hold. You will also be obliged to take proactive steps in locating and preserving relevant information. Where appropriate, relevant back-up media will have to be identified and stored in a safe place. In cases where metadata will be relevant, it may be essential to immediately copy hard drives and other data retention equipment with the assistance of experts so that no metadata is inadvertently changed by people simply using the company's document system in the ordinary course. A party's preservation and production obligations are continuing ones. Accordingly, it is likely that the legal hold will have to be periodically reissued and key players periodically reminded of their obligations in this respect.

5 NO. In *Air Canada v. WestJet Airlines Ltd.*, Justice Ian Nordheimer held that a detailed review for relevance and privilege must be performed after an electronic search has been completed. This is because: (1) electronic searches alone cannot distinguish between documents that use a word in a relevant context over documents that use the same word in an irrelevant context; and (2) the mere application of search terms has a very large potential for the disclosure of privileged material and does not eliminate to the degree reasonably possible the inadvertent production of privileged documents. In most cases, the required detailed review must be conducted manually. Nordheimer recognized, however, that it might be acceptable to conduct the detailed review electronically in some cases.

6 ALL OF THE ABOVE. A substantial body of jurisprudence has developed in the United States in connection with sanctions to be applied for a party's failure to comply with its electronic discovery obligations. See, for example, *Zubulake v. UBS Warburg LLC*. Canadian jurisprudence on the issue of sanctions is not as fully developed, but is quickly catching up. In a 2006 Manitoba case, the court concluded that a party had wilfully destroyed hardware and software contrary to undertakings to preserve this material. This resulted in the dismissal of the plaintiff's action.

YOUR RANKING?

2 or fewer correct: Oops, you just cost your company serious cash in a settlement.

3 to 4 correct: Not bad, but you could do better.

5 to 6 correct: Very good. You're a Tort Titan.