NEWS

# Client Alert: Limiting eDiscovery in Advance in Material Contracts

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The Federal Rules of Civil Procedure were amended in 2006 to acknowledge the increasing significance of electronically stored information in litigation. These amendments and similar amendments to state rules have cemented the importance of electronic discovery or "eDiscovery" in the litigation discovery process. In addition to being complex and voluminous, eDiscovery can be associated with significant costs to the producing party. These can include the costs of production, the costs of preservation and the potential for spoliation sanctions. Prior to producing electronic information, it can cost upwards of $30,000 per gigabyte for a producing party to conduct a review of electronically stored information for relevance and privilege prior to production. In addition, there are costs associated with implementation of preservation policies and tools, and the disruption to employees' productivity when dealing with legal holds and collection. The Federal Rules of Civil Procedure provide for significant sanctions if a party fails to preserve electronically stored information, but fortunately sanctions are rare.

Absent fraud, public policy concerns or unconscionability, courts routinely enforce provisions that modify the litigation process such as jury trial waivers, forum selection clauses, governing law provisions, and arbitration provisions. In some cases, these contractual provisions have become so common that parties think of them as "boilerplate." Given the willingness of courts to uphold other contractual clauses that modify the litigation process, it is likely that courts would uphold provisions that attempt to deal with some of the issues that make eDiscovery particularly challenging, especially in commercial contracts between sophisticated parties.

For example, parties could consider modifying commercial contracts, merger and acquisition agreements, purchase agreements for significant assets, material license agreements, confidentiality and non-disclosure agreements or other material contracts to include provisions that:

1. circumscribe (as between the parties) the duty to preserve electronically stored information until a notice or a request to preserve is served;
2. impose limits on the amount of discovery allowed, including the amount of preservation required (for example, removing any duty to preserve backup tapes or volatile memory);
3. allocate the costs of ordinary eDiscovery to the producing party and extraordinary eDiscovery to the requesting party (for example, requiring the requesting party to pay for any requests beyond the scope of the agreed upon eDiscovery process and indemnify the producing party for any challenges to the enforceability of the agreed upon eDiscovery process); and
4. agree to limit the application of sanctions for purported eDiscovery failures (for example, conditioning any award of spoliation sanctions on the producing party's actual knowledge of spoliation).

While parties should consider including one or more of the restrictions described above in material contracts to help limit the potential costs of eDiscovery in any future litigation, parties should only incorporate these limits after careful consideration for several reasons.

First, contractual provisions that are intended to limit eDiscovery obligations are more likely to be enforced if they are tailored to the facts and circumstances of a particular transaction.

Second, eDiscovery limitations will only function as intended if adapted to a party's objectives in a particular transaction.

Third, before including contractual limits on eDiscovery, a party should consider the implications of the limit. For example, contracting parties cannot eliminate preservation duties owed to third parties or that are imposed by law, regulation or rules of self regulatory organizations. So a producing party must still preserve electronically stored information to the extent that there are extra-contractual preservation duties.

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