“EPHEMERAL DATA” AND THE DUTY TO PRESERVE DISCOVERABLE ELECTRONICALLY STORED INFORMATION

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ABSTRACT:
The duty to take reasonable steps to preserve evidence discoverable in pending or anticipated civil litigation is well established in U.S. civil jurisprudence. However, the nature of evidence has changed significantly in the past few years, as recognized by the December 2006 “e-discovery” amendments to the Federal Rules of Civil Procedure and subsequent efforts to amend the discovery rules in several states. These new rules only make passing reference to the question of preservation, and they do not even define the “electronically stored information” (ESI) that may be subject to discovery. During the first year that the amended Federal Rules have been in effect, several courts confronted the intertwined issues of whether the duty of preservation extends to ephemeral ESI that is generated by computer systems, and if so, what steps are considered “reasonable” to meet that duty. This article explores the most high-profile of those cases, Columbia Pictures v. Bunnell, and compares the court’s analysis of “random access memory” (RAM) to several other cases involving the preservation of other types of ephemeral data.

The author concludes that while the duty to preserve ephemeral ESI is narrow, a duty may exist where the responding party is on notice that the ephemeral ESI is highly relevant and unique, and where the burden and cost of preserving the ephemeral ESI do not outweigh the value of its preservation. To ensure that reasonable steps are taken to preserve relevant ephemeral ESI, and to avoid sanctions, both the requesting and responding parties need to enter into early negotiations to come to an agreement regarding the preservation of the ephemeral ESI.

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