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# Risk WATCH

"e-Discovery"

The Risk Management Division originally distributed this RiskWatch alert September 12, 2006. At that time, Federal Court rules requiring agencies to locate and preserve electronic documents related to disputes were on the immediate horizon—taking effect December 1, 2006.

While that date has long passed, the need to fully understand and address the requirements of electronic discovery remains a highly critical risk management area for agencies. It's well worth a few moments of time to review key points related to managing "e-discovery", which are provided below.

**Lucy Isaki**

Senior Assistant Director and Legal Counsel—OFM  
State Risk Manager

## *Managing Electronic Document Discovery Risk*

Recent cases and the December 1, 2006, changes to Federal Court Rules, require agencies to locate and, importantly, preserve electronic documents related to disputes--particularly if a lawsuit is anticipated.

**Agency risk managers** must work closely with lawyers from the Attorney General's Office to identify the key people who reasonably can be expected to have documents related to a dispute. Key points for risk managers to consider:

- Your lawyer will be able to give you invaluable information about anticipated claims and defenses.
- You will need this information to identify people with relevant e-documents.
- You will also need to work with lawyers and IT experts to develop a written plan to preserve those e-documents without the alteration of the native file or any important data. The Attorney General's Office is available to train your agency on rules and help you to draft a solid preservation plan.

Because electronic discovery is a new issue for many agencies, provided below are helpful tips written by Jeane A. Thomas, Esq. Ms. Thomas is a Partner in the Washington, D.C. office of Crowell & Moring LLP and a member of the firm's Antitrust group.

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**PRACTICE POINTS: GUEST ARTICLE BY JEANE A. THOMAS, ESQ.:  
TIPS FROM THE TRENCHES - PRESERVATION OBLIGATIONS**

One of the most difficult and high-risk areas of electronic discovery is identifying and complying with the obligation to preserve electronic material. Much has been written and said about when the obligation to preserve begins, what data must be preserved, how the data should be preserved, and who should do the preserving. Given the pending amendments to the federal rules and dramatic growth in the volume of electronic material, we expect much more litigation in this area and many more significant fines and sanctions for failure to meet preservation obligations.

The following guidelines will help reduce risk:

1. Upon notice that a claim may exist, actively preserve the electronic files (including back-up and archived data) of key custodians and other key sources of relevant data (e.g., shared databases). At a minimum, a litigation "hold order" should be issued and preservation instructions should be specifically reviewed with key custodians and IT personnel.
2. A litigation "hold order" may not be sufficient. For key custodians, consider imaging hard drives and collecting data from network servers within days or hours of identifying the preservation obligation.
3. Carefully maintain the chain of custody for all data collected and segregate relevant back-up tapes and collection media from all other IT operations -- for example, in counsel's office.
4. Designate an expert to supervise the preservation process from beginning to end. That individual may need to serve as a witness in later litigation and should have careful records of all steps taken. Consultants are particularly useful in this role.

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***For questions or comments, contact:***

***Jolene Bellows***

**Education and Safety Specialist**

**Office of Financial Management**

**Risk Management Division**

**PO Box 41027**

**Olympia, WA 98504-1027**

**Phone: 360-902-7312**

**E-Mail: [jolene.bellows@ofm.wa.gov](mailto:jolene.bellows@ofm.wa.gov)**