Legal Commentary

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The Electronic Paper Chase: What You Don't Save Can Hurt You

Every business should have a consistent system for document retention that meets the court's new 'e-discovery' rules

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Lately, you've probably noticed more than a handful of articles about the new electronic discovery rules that went into effect in the federal courts in late 2006. You may be tempted to think it doesn't affect your business, or say, "I'll let my lawyer worry about this one." But that's just what today's plaintiffs' attorneys are counting on.

If you use a computer in your business at all—even if it's just to send e-mail and draft letters— then the rules apply to you, and you need to take proactive steps to minimize risk.

Over the past decade, an increasing amount of business is being conducted electronically, much of it by e-mail. It's estimated that there are more than one billion business e-mails created in the U.S. each day. Less than 20% of these are ever printed, and 95% or more of all new documents are stored electronically. Some formal structure was needed to govern this volume of data within the litigation context.

How to Lose a Case

That structure arrived on Dec. 1, 2006, when the rules of document retention for all federal litigants (rapidly being adopted by the states) changed to reflect the reality that many, if not most, "documents" that are increasingly important in litigation are electronic.

Document production was once a simple matter of accessing hard-copy files and producing documents. Now it has vastly expanded to include what is termed electronically stored information. It is no longer enough to review and provide hard-copy files, which might or might not include printed e-mails, voicemail transcripts, spreadsheets, etc. Failing to comply with the new rules by not providing your electronically stored information, or ESI, will likely lose your case.

But the capture of existing and/or ongoing ESI can be a large and potentially expensive task. The use and cost of third-party services and/or internal staff raises many questions. Will any of this be paid by insurance? What is or is not accessible data that can be searched? Who should bear the costs?

Because of potentially high costs of searching and producing ESI, many businesses will be forced to settle lawsuits that are just too expensive to defend. Good plaintiffs' lawyers know this, and they are preparing right now to use the "e-discovery hammer" against businesses.

Picture an employment discrimination case where the ex-employee demands $250,000 to settle and the budget for your company to find, hold, review and produce your e-mail/ESI is more than $200,000, and this is only for preparation of the litigation. How do you protect yourself against such tactics?

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Learn to Purge Properly

Businesses must act now to set up systems, protocols and policies for document retention.

Waiting until a lawsuit arises to address your business' document retention and e-discovery needs is too late. Businesses must act now to set up systems, protocols and policies for document retention so that when they are ultimately sued, they are in the best position to preserve, search and produce relevant, electronically stored information in the most efficient manner. Knowing how to properly

preserve what must be kept, and how to shed what is not needed, will help bypass the type of extreme litigation costs that might force a business into an early settlement under unfavorable terms.

Once this type of internal policy is in place, it will provide the business with a safety net when dealing with its preservation and production obligations under the new rules. Specifically, if documents or electronically stored data are purged on a regular basis under a set policy and at set intervals in the normal course of business operations, before the duty to preserve (because litigation seems likely) arises, then it is unlikely that a court will find that the purging was improper or illegal. Such a neutral document retention policy, consistently applied, can be the key to showing that the document was destroyed as part of normal business operations, not after the individual knew that litigation was forthcoming, or wanted to destroy evidence.

Litigation Holds

All good document-retention policies provide for litigation holds. Once a business is on notice of potential litigation, it must act swiftly to suspend routine document and ESI destruction and identify and preserve all potentially discoverable ESI. A litigation hold is the best and really only way to accomplish this.

A litigation hold must be in writing and issued to all key players. It should be broad in scope and consistently applied. A business that needs to issue a litigation hold should follow these steps:

> Immediately suspend routine document destruction at the user and network levels;

> Suspend recycling of back-up tapes that may contain potentially discoverable ESI;

> Notify, in writing, your archival facilities and IT professionals to suspend routine destruction and preserve ESI;

> Identify all sources and key ESI custodians;

> Notify key custodians to suspend destruction of ESI by a written litigation-hold memo;

> Meet with each custodian to identify all sources of potentially discoverable information. This includes both hard-copy documents and ESI. A business should also consider asking each key player to sign acknowledgments certifying they have turned over and continue to preserve all potentially relevant documents and ESI;

> Get certifications from IT personnel to establish chain-of-custody;

> Monitor compliance, issue reminder memos and watch out for new and departing employees. Businesses may also want to consider taking bit-map images of relevant electronic devices of key and departing employees.

These are the minimum steps a business should use in issuing a litigation hold. Courts expect businesses to issue litigation holds at the right time (that is, when litigation is reasonably anticipated) and monitor compliance to ensure that the litigation hold is followed.

Old Rules Still Apply

But what about the document-retention obligations that businesses had before the new e-discovery rules? Businesses still have to contend with myriad rules for retaining documents that existed before the advent of e-discovery.

For example, most employee-exposure records must still be kept for 30 years under the occupational safety and health laws; I-9s must still be kept for three years from the date of hire or one year from the date of termination under the immigration laws, whichever is longer; and records relating to leave taken under the Family and Medical Leave Act must still be kept for three years. Such rules still apply, but now with the overlay of e-discovery obligations.

Document retention has become a fairly complex construct of legal obligations, and a business that fails to comply with all of the legal requirements electronic and otherwise in this modern document retention labyrinth does so at its peril. It subjects itself to substantial risk of dire consequences in the event of a dispute, lawsuit or government audit.

How to Protect Your Company Before Litigation

1. Have your act together on ESI and other document-retention obligations before you find yourself in a dispute or government audit, because, otherwise, you won't have time to comply with the rules.

2. Train your staff to be very careful with what they put into a computer, e-mail, voicemail, text messages etc. These documents, without context, can destroy your fact position in a given piece of litigation. Instruct everyone that an e-mail or document should be fit for review by their boss and their boss's boss, or it should not be written.

3. Institute a policy to purge electronically stored data, which you are not otherwise obligated to keep by law, on a regular basis under a set policy in the normal course of business operations before the duty arises to preserve it because litigation seems likely.

4. Once you are aware that litigation may ensue, document all internal steps you take to comply in good faith with the litigation-hold requirements.

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