

Failure to preserve

How deleting electronic information can cause you to lose a trial before it begins **Interviewed by Sue Ostrowski**

If your company is being sued, don't even think about deleting any electronically stored information (ESI). Instead, you need to preserve your electronic information like documents, e-mails, PowerPoint presentations, voice mails, and any audio or visual recordings. Each of these items could be evidence in your case.

"Litigators engage in discovery, and for a long time, that has generally meant that I give you my documents and you give me yours," says John Susany, chair of the litigation and employment group at Stark & Knoll LPA. "That's changed. Documents now include electronic documents. So the question becomes, what do you do with computer data? The answer is that you have to produce it to the other side if it's responsive because this electronically stored information could ultimately be evidence in a trial or a hearing."

Smart Business spoke to Susany about how to make sure you preserve your ESI and how failing to do so could cost you in court.

Once you've been sued, what is the first thing you need to think about regarding your ESI?

Your obligations begin before you even receive the lawsuit. As soon as a company becomes aware that it is likely to be sued, it needs to preserve and safeguard its electronic data.

To do that, you need to understand what the sources of electronic information are because you need to identify and secure any relevant information. That is sometimes a gargantuan project because the vast majority of documents a company creates are electronic. For big companies or those with an IT person, it's somewhat easier because the IT person can oversee it. But in smaller companies that don't have an IT department, someone has to take control of the case, inform the employees about what electronic information is, and create a plan to protect it.

You don't want to delete e-mails or documents. In some cases, you want to preserve the hard drive of a computer to allow you to access all versions of a document. With ESI, what you produce is not just the final iteration of a document, like the signed contract. In the old days, you would just produce the pieces of paper that you saved. But through the magic of computer storage, you have to produce



John Susany
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every iteration of that document, including every change in it that anyone has made, from its genesis to its final form.

Even though not all electronic information that a company generates is responsive to a discovery request or even relevant to a lawsuit, you still must preserve it. For example, in an employment case, the personnel file, employee handbook and written evaluations are almost always relevant, but company communications with the employee, personal communications with the employee and e-mails about that employee all become relevant. As with paper documents, you and your attorney have to make an analysis of what types of electronic documents are needed, and you have to make sure they're produced.

How would the other side know if a company deleted evidence?

Just because you delete electronic information it doesn't mean it's necessarily gone. For example, deleting an e-mail doesn't remove it from the computer's hard drive. Hitting the delete button really just hides it from your view. Forensic experts can review computers and networks, and in most cases, can retrieve the deleted data. In those instances where informa-

tion has been destroyed, its destruction or even extraction leaves an electronic footprint. In that way, the forensic expert can show there was a deletion or extraction event and likely show who did it. It would be an awkward thing to explain to a judge why you or one of your employees deleted information when you knew a case was coming.

What are the consequences of failing to preserve electronically stored information?

If you get sued, you're focusing on fighting what's in the complaint. If you're not as focused on preserving and producing evidence, your failure to do that could cause you to lose the case.

The courts have been very, very tough on companies and attorneys who don't do this. If they believe you or your company has done this, the opposing party can file a separate cause of action against you for 'spoliation,' which is the destruction of evidence. If a party in a lawsuit is found guilty of spoliation, the court has almost limitless remedies it could impose.

If the party who brought the case destroyed evidence, the court could dismiss the lawsuit. It could also impose sanctions like a fine or issue rulings that undercut the case. For example, it could limit the evidence a party is allowed to present during the trial. It could even allow the jury to assume certain things that haven't been proven in court, under the theory that, if a party hadn't destroyed the evidence, the other side could have proven its case.

On the other hand, if the defendant destroyed evidence, the court could decide the case against it. Simply put, the judge can just say, 'You lose. I don't care what other evidence you might have. But, because you destroyed evidence, I am deciding that you are hiding something, and I'm going to find you liable.'

If you are in the midst of litigation and haven't taken steps to protect your electronic information, you may have already lost your case. So, if you're in that situation or if you're about to get involved in a lawsuit, get moving. You have a lot of work to do. <<

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