

During the past few years, preservation of electronic information has become a hot-button topic in litigation. Effective December 1, 2006, the Federal Rules of Civil Procedure were amended to ensure proper discovery of electronically stored information. While the Massachusetts Rules of Civil Procedure have not yet been modified, proper preservation and production of electronically stored information is an important first step whenever the possibility of a lawsuit requires.



Upon awareness of the possibility of a lawsuit or actual notification of a lawsuit, a company and/or individual is required to take steps to preserve any and all information and documents, including electronically stored information that may be relevant or related to the lawsuit. The first question in preserving electronically stored information is what must be kept? Initially, it is important to always remember that files that are stored in electronic format must remain in electronic format, i.e. printing a hardcopy does not satisfy a requirement to preserve electronically stored information.

Examples of electronically stored information that needs to be preserved in its native (electronic) form include, but are not limited to: letters, memos, notes, outlines, spreadsheets, e-mails, and other documents or information evidencing communications, financial information, word processing documents and spreadsheets, and databases, calendars, telephone logs (for and including cell phones), contact information, Internet history (or usage files) and plan and network access information.

In addition, the following must also be preserved:

1. **Software:** databases and networks computer systems, including obsolete systems enterprise servers and archives for backup or disaster recovery systems types and disks drives cartridges and other storage media; and
2. **Hardware:** laptops, business and personal computers (even home computers if used for business purposes), Internet data, personal digital assistants (PDA's), handheld wireless devices, extra hard drives, zip or thumb drives, mobile telephones, pagers and audio systems (living voicemail).

Any and all routine data destruction and backup tape recycling policies which can relate to the potential or pending litigation must be discontinued. Computer hardware storing any information cannot be disposed of unless an exact replica (or mirror image) is made by appropriate experts. In addition, all manuals with written instructions, network access codes, and like information, especially those concerning obsolete systems, must be preserved.

These requirements will apply to any contractors working for an individual or company, as well as any employees. Furthermore, these requirements should be taken into consideration during the drafting or editing process on the retention or destruction of documents and other information so as to ensure compliance even where litigation is not anticipated.