

## BUSINESS LAWSUITS



### **New Rules for the discovery of electronic information will significantly impact businesses and individuals involved in business and employment litigation.**

Atticus Finch would recognize that technology and lawsuits are established facts of business life. It is hardly revolutionary to note that increasing amounts of information is stored and transmitted using computers and other electronic gadgets and tools. This reality has, as of December 1, 2006, formally made its way into the Federal Rules of Civil Procedure and less formally into the State Courts. In civil (i.e., non-criminal) lawsuits, the rules of procedure allow for a broad exchange of information between the parties to the lawsuit. An increasingly vast majority of the valuable information resides in electronic format on computers and other devices. Managing the request and production of this electronically stored data, so-called E-Discovery, is a reality we must all embrace.

Each party to a lawsuit will have among its first tasks the consideration of what types of information to request from the other side. For example, in employment cases, the

parties will always want all e-mails for both home and work computers. In contract cases, the parties will seek the various drafts of the written contract, any subsequent amendments, and perhaps PowerPoint presentations or similar materials prepared pursuant to the contract. Generally, internal and external communications will play a critical role in proving and defending a dispute. An informational technology specialist must guide the process to ensure the responsive information is found and copied for transmission to the requesting party in an appropriate format. The time period for which information will be sought will likely require review, analysis and copying of backup tapes or other archiving systems.

Some information may be corrupted or not retrievable. Explaining when and how the information was corrupted will become important. Once a lawsuit or serious dispute arises, parties must take reasonable steps to preserve all relevant data.

Morgan Stanley & Co., Inc. learned the hard way when the mismanagement of its electronically stored data resulted in a series of unfavorable court rulings culminating in \$1.45 billion dollar jury verdict against it.

Individuals and businesses alike must be aware of the court's expectations and their obligations regarding electronically stored data. Businesses should have a "go to" computer expert either employed or regularly consulted so that someone knows what systems exist and how they are configured. This information, moreover, should be reduced to writing. The new rules make the development of a records retention policy imperative. If a dispute arises and information is lost because backed up information is destroyed, dire consequences could result. Similarly, information that no longer exists because it was written over pursuant to a reasonable, written policy will protect a party from sanctions.

Whether a business employs good organization and sound policies, and its level of adherence to those policies, will be the lens through which the courts will evaluate a party's conduct. The more resources available to the company, the greater the burden the company has to manage and retrieve its electronically stored data. (*cont.*)

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(cont.) Attorneys must be fully educated about their client's hardware and software. Judges in early pre-trial and discovery conferences will expect disclosures of what information exists and where it resides. Often, courts will enter orders based upon the party's representations regarding this information. If the production is inconsistent with the court's expectations or the party's representations, then the cost to retrieve and reconstruct information will be borne by the unprepared and noncompliant party.

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Individuals as well as businesses will bear the brunt of this new era of technology. Employees who bring actions against employers can expect to have their home or laptop computers imaged and reviewed. Complaining employees will likely know before their employers that an objectionable workplace circumstance exists.

The failure to preserve, or worse, to destroy e-mails and the like, may carry adverse and costly consequences including at best an inference that the destroyed emails were harmful to your case, or at worst the sanction of judgment against you.

The importance of formulating and adhering to a reasonable policy for the retention of information, electronic or otherwise, therefore, cannot be overstated.

Intertwined with the concept of E-Discovery is the reality of personal use of business computers. Employers sued for sexual discrimination are always surprised to see "jokes" circulated amongst groups of employees clearly communicate in employees, many times including supervisors for whose conduct companies face strict liability.

Policies for computer use must be developed, written, communicated and enforced. Best practices dictate that writing that employees should have no expectation of privacy on their business computers and that periodic inspection may or will occur.

The well known benefits of ease and efficiency of technology has led to the inevitable migration of data to electronic medium. A good New Year's resolution is to speak to counsel to understand the expectation of retrieving electronically stored data and to establish policies and procedures to manage the information. It will take time, so start now.



## **ELECTRONICALLY STORED INFORMATION CHECKLIST**

- Who is the person most knowledgeable about the hardware and software we use, including the versions of software?
- Do we have a document retention policy for when documents such as e-mails may be written over?
- If sued, who do we want to testify about our systems capabilities and limitations?
- If information is copied to our hard drives, CD's, DVDs, Zip drives, etc., is it more accessible than information on back-up tapes that may not be immediately accessible? Similarly, how is this media stored?
- If we receive a letter identifying a dispute or potential disputes that demands the preservation of electronically stored data, how will we handle the letter and our so-called preservation obligations?
- Do we have a records retention policy, computer usage policy, or employee privacy policy?
- Do we communicate and educate our employees about these policies?
- Do we monitor and enforce these policies?

*For questions, please contact Attorney Robert Berluti, the Firm's Litigation Partner, or one of the Firm's Litigation Associates.*