

Do Not Delete: A Word To The Wise In The Age Of Electronic Discovery

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Electronic discovery...the new dirty word in [litigation](#).

Gone are the days when business is done by paper. Now, agreements are signed electronically, communications are in the form of emails and business is done through computers and smartphones. This may be convenient, but business through electronic devices has vast ramifications. When the deal or employment relationship sours, lawyers are no longer asking for paper documents alone. In this age of electronics, savvy lawyers are requesting the search of employee workstations, pda's and telephone records.

What Should My Business Do to Preserve Electronic Data?

Electronic data creates a host of legal and practical problems for both businesses and litigators. For businesses, it is essential to have document preservation policies that are followed. Having a document retention policy is a great start. However, if you have one and don't adhere to it, your business may have been better off without a policy. If you have a policy, make sure that the key players are familiar with the policy and properly trained. Keep in mind that even if you think you have deleted a document, that is often not the case. Electronic discovery experts are trained to locate deleted and/or altered files. In addition, data should be backed up consistent with a corporate policy.

What do I do with electronic data when litigation is looming?

For purposes of litigation, the first rule is to preserve electronic data. In fact, once litigation is reasonably anticipated, you are required to preserve the data. If litigation is reasonably anticipated or initiated, the data should be backed up and should not be altered. This is frequently referred to as a

litigation hold.

What Happens if My Business Does not Preserve Electronic Information?

Failure to do so may result claims of spoliation (the intention withholding, altering or destroying of evidence) and the court imposing an adverse inference. The phrase is rather self-explanatory in that your destruction of data infers that it was done for an improper purpose and a reason. In certain circumstances, a court can impose sanctions (money damages) when a party or counsel deletes data or fails to initiate a litigation hold.

What Can You Do With Electronic Data?

Electronic data can be produced in many formats. The format in which it is produced effects what can be done with the data for purposes of litigation. In many cases, a vendor will make a mirror image of an electronic drive to preserve the data.

Frequently, the universe of electronic data in a particular case is vast. As a result, the parties are often required to agree on search terms. The data can then be searched in order to locate relevant documents. If your case involves electronic discovery, it is important to involve any IT personnel at the outside and frequently, retain an outside expert to assist in the preservation, production and search of data.

What is the Expense of Litigating in the World of Electronic Discovery?

Electronic discovery is expensive. First, electronic discovery experts frequently charge by the gigabyte of data that needs to be preserved or captured. In addition, there is a substantial cost in the search and indexing of data. Frequently, these experts are necessary for purposes of consultation to assist the lawyer with discovery requests and procedure. Finally, the cost of reviewing voluminous electronic discovery and reviewing privileged information can be staggering.

If you anticipate litigation, it is vital to contact an attorney experienced in the burgeoning area of electronic discovery. It is vital that all paper and electronic data be preserved and for your attorney to request the appropriate electronic discovery. Today, is it often the electronic documents that will make or break your case.