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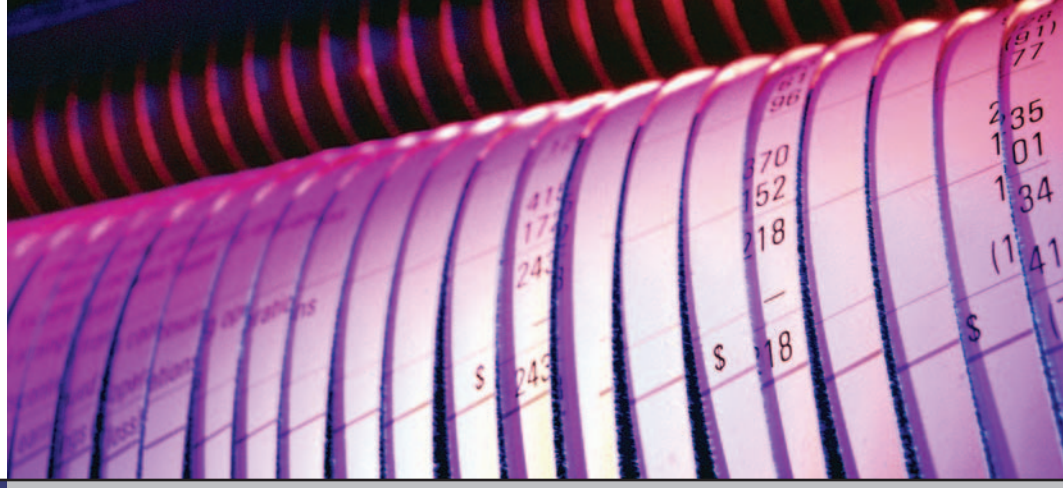

e-Discovery Advisory

As the era of electronic document discovery unfolds, the risks to parties in litigation and their counsel continues to escalate.

For the past few years, courts have been putting litigants to the task of preserving documents, when a party reasonably knows or should know that a dispute may lead to a lawsuit. After the leading case of Zubulake v. UBS Warburg, LLC, a party through counsel must place a litigation hold on relevant information so that it may be discovered, retained and produced. Counsel has a duty to effectively communicate these obligations to their clients. Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574 (SDNY 2004). Failure to discharge this duty may result in sanctions, such as adverse inference instructions to a jury, imposition of costs of additional discovery, and even in judgment against the non-complying party.

In addition, courts are placing a duty on employees of a litigating party to produce copies of relevant electronic evidence and arrange for the segregation and safeguarding of any archival media such as back up tapes, as well as metadata, disk drives, and the like.

In an extreme example, the failure to discover and consistently produce data, after counsel had certified compliance with discovery requests, contributed to an adverse verdict of $1.4 billion in Coleman Holdings vs. Morgan Stanley, 2005 WL 674 Id. 85 (Fla. 15 Jud. Cir. Palm Beach Cty. 2005).

As a result, many companies, firms and organizations are working with inside IT personnel, computer forensic experts and outside counsel to develop document retention policies which will enable the company, firm or organization to rationally preserve data and documents uniquely essential to its business, while systematically disposing of data such as emails on a regular basis, so long as a litigation hold with respect to certain relevant data and communication is not in place.

Another federal court recently imposed a drastic remedy in the case of In Re: Old Banc One Shareholders Securities Litigation, 2005 WL 337, 2783 (N.D. Ill.), in which the defendant had been put on notice that certain categories of documents were relevant, and therefore had a duty to retain them. The court found that because the defendant had been unable to produce these documents, it had breached its duty to retain or preserve them.

Most pointedly, the Court in Old Banc One noted that the defendant did not have a comprehensive document retention policy in place during the litigation and then it took ten months for the defendant to tailor a policy for the lawsuit. Further, the defendant did not make a dissemination in writing to all employees of the necessity of preserving documents relating to the litigation and failed to take steps to ensure that employees read the electronic version of the policy and that they followed it. Accordingly, the Court ordered that the defendant would be prevented from cross-examining the plaintiff's financial expert and that the jury would be instructed as to this limitation and the reason for its existence.

What steps should a company, firm or organization take now, to minimize the risk of similar outcomes?

As suggested by the cases discussed here, the Company should develop an electronic document retention policy. Key elements of this program include:

1. **A clear written policy;**
2. **Training of personnel to following the policy;**
3. **Dissemination of the policy across the company, firm or organization;**
4. **Periodic reminders; and**
5. **A gatekeeper who can take steps to prevent the deleting or erasing of information in the event of a claim or lawsuit.**

Additional Information

For more information on these issues or any others regarding electronic discovery, please contact:

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