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Why Every Business Needs a Document Retention Policy that includes an Electronic Document Archive

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- We live in an increasing complex, technological age that relies on computers to accomplish most every day tasks, in our personal lives and our businesses;
- Internet access, email and instant messaging is no longer a novelty; it is a necessity of "doing business" today;

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- This technological complexity has also spawned increased regulatory oversight
  - Most governmental agencies now prefer, if not require, the electronic filing of documents:
    - Internal Revenue Service
    - US Federal Courts, including the Bankruptcy Courts
    - US Patent and Trademark Office
    - Securities and Exchange Commission
    - New York State Supreme Courts

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- Many new, state and federal statutes also have been enacted to protect individual privacy rights, subjecting businesses to ever increasing record keeping and reporting obligations:
  - The Graham Leach Bliley Act – requiring businesses who access or use a customer's personal financial information to issue a privacy statement annually to notify how it intends to collect and use such information;
  - Health Insurance Portability and Accountability Act – requiring businesses who access or use an individual's personal health information to issue a privacy statement explaining how it intends to collect and use such information

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- The Sarbanes Oxley Act
  - Requiring accountants who audit or review financial statements for publicly traded business to retain certain business records of the client;
  - Imposing criminal sanctions on any publicly traded business that engages in document destruction even if such document destruction occurs before the commencement of any official proceeding if it can be inferred that the business knows or should know that a claim may be threatened or asserted;
  - Corporations and their officers can be held criminally liable under this statute!

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- Both privately held and publicly traded business must be concerned about and address these issues.
- Why? Because federal and state law has *always* imposed obligations upon business to keep "business records" for a prescribed length of time;
- This new, electronic age with increased regulatory oversight has just increased that burden for business.

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- Similarly, under both state and federal civil procedure laws, any business involved in a lawsuit, whether as a plaintiff or a defendant, has *always* been legally *required* to maintain and produce during discovery all documents requested by the opposing party that are arguably relevant to the litigation and that are not otherwise privileged;

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- Case law developments in virtually every state, including New York, have also made it clear that email, instant messaging and other electronic documents are "business records" that must be produced during the litigation discovery process;
- Statutory amendments to the federal and state civil procedure laws, in virtually every state, including New York, have codified this development;
- Email, instant messaging and virtually every other business document created or stored on a business computer is a discoverable "business record";

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- Failure to comply with these requirements and to produce relevant electronic business records during the discovery process may subject the litigant and/or its attorney to literally thousands of dollars in monetary and other sanctions, including in egregious cases, court orders precluding the litigant from introducing any evidence at trial!
- Courts are not swayed by a technical inability to comply because business systems are antiquated and outdated; this will not be an acceptable excuse.

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- To make matters even more interesting, Courts will typically not permit a business litigant to substitute paper copy of a business record for electronic copy and produce the paper copy if the electronic copy is requested;
- Courts expect litigants to produce relevant business records in their "native format," i.e., their electronic format if an electronic document;
- This is because the electronic copy contains *metadata* encoded in the electronic copy that can be extremely important to establish the authenticity of the document, who sent it, when, to whom and when and if it was received;

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- Businesses may be subject to criminal or civil sanction if it retains hard copy of an electronic document, like an email or an instant message, but does not retain the electronic copy;
- This is particularly true if litigation is imminent or has been commenced;

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- There are innumerable, recent cases, in every jurisdiction in the US that have held businesses liable under this scenario, imposing stiff monetary sanctions as well as judicial sanctions:
  – Adverse inference instructions to the jury;
  – Evidence preclusion orders;
  – Granting a default judgment on the merits in egregious cases;

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- If your client's business practice is to print hard copies of electronic documents like email and destroy the original electronic version*, this practice should be changed, now.*
- Clients should be retaining the electronic version, in a way that permits cost effective and timely retrieval.
- If clients destroy documents on a regular basis as part of an established document retention policy, then make sure it adheres to the policy rigorously and if there is even a threat of a lawsuit, STOP.

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- There is a silver lining in all of this; the good news is that courts have uniformly approved document retention policies (or a DRP) that meet the following criteria:
  - The DRP must comply with applicable regulations in your industry, that is, a client must keep documents as long as its industry is legally required to keep them; the rules vary by industry; for law firms, it is minimally 7 years.
  - The DRP must be reviewed and updated periodically to keep abreast of case law and statutory developments in your jurisdiction;

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- The DRP must be implemented in *good faith, that is, it must:*
  - *Provide ready access to the required information;*
  - *Be designed with WORM (write once, read many times) technology so as to assure the authenticity of the document, i.e., that is isn't altered;*
  - *Consider in its design the likelihood that claims will be asserted that will render the archived or destroyed document relevant and discoverable, so that, the more likely it is that information is important, the less likely it should be that it will be quickly destroyed;*

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- Consider in the DRP design the significance of the claim that is likely to be asserted and that will render the archived or destroyed information relevant and discoverable, so that the more important that the information contained in the document is, the less like that the document will be quickly destroyed, even if the assertion of a claim is unlikely;
- The DRP must be uniformly applied and cannot be implemented in an ad hoc fashion at the worker's desk top;
- MUST REQUIRE that all document destruction CEASE as soon as the business knows or has reason to know that a claim may be or has been asserted.

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- The DRP must also include a readily accessible storage, search and retrieval mechanism for electronic documents;
- The DRP must also include a self-perpetuating mechanism to audit for compliance on a regular basis;
- Perhaps most importantly, the DRP must be formally documented and disseminated within the business, on a regular, repetitive basis, from the top of the organization down;
- Pay special attention to new hires; train!
- A DRP that is developed in accordance with these guidelines and that is consistently applied will protect a business and its officers and directors from sanctions for document destruction.

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- New Amendments to Federal Rules of Civil Procedure document these changes:
- Rule 26(a) clarifies a party's duty to include in its disclosures electronically stored information (ESI);

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- Rule 34(a) distinguishes between "documents" and "ESI";
  - Allows the requesting party to designate the form in which the ESI is to be produced;
  - If no objection is made to the form requested for production of ESI or if none is specified, the responding party must state the form it intends to produce.
  - Unless there is an agreement or court order to the contrary, the ESI must be produced in the form it which it is ordinarily maintained or in which it is reasonably useable;

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- Rule 26(b)(2) – Document Production
- Designed to address difficulties in locating, retrieving and providing discovery of ESI;
- Rule states that ESI need not be provided if it is "not reasonably accessible because of undue burden or cost."
- Producing party bears the burden of proof;
- Even if it meets this burden, Court may still order production of the information for "good cause shown" but may imposed additional burdens on the requesting party, i.e., cost shifting or orders to "sample" the discoverable sources.

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- Rule 26(b)(5) – Claw Back Agreements
- Rule 26(b)(5)(B) provides for a notification procedure for discovery materials disclosed after thereafter asserted to be subject to a claim of privilege or protected as material prepared for litigation;
- Producing party must notify the recipient of this claim and its factual basis;
- Upon notification, the material must be promptly returned, sequestered or destroyed and the material may not be used or disclosed until the claim of privilege is resolved;
- Also, the receiving party must promptly deliver the materials to the Court under seal for determination of the claim;
- If the receiving party has already disclosed the information when the claim was made, it must take "reasonable steps" to retrieve it.

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- Rule 16(b); 26(f) – Scheduling Orders
- Rule 16(b) sets out requirements for planning and scheduling and general requirements of the duty to disclose;
- New provisions permit the Court's Scheduling Order to include provisions addressed specifically to the disclosure of ESI;
- The Court may also include in the Scheduling Order "any agreements that parties reach for asserting claims of privilege or protection as trial-preparation material after production."

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- Rule 33(d) – Interrogatory Responses

- New language in Rule 33(d) ensures that the definition of a "Business Record" for purposes of an Interrogatory response expressly includes electronically stored information or ESI; it does not just refer to "Documents";

- Rule 45 - Subpoenas
- Changes to Rule 45 make absolutely clear that ESI can be obtained by subpoena.

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- Rule 37(f) – Implied Duty to Preserve
- Provides a safe harbor for parties and protects from sanctions for failure to provide ESI that has been lost as a result of **routine, good faith** operation of a DRP **absent exceptional circumstances.**
- Can provide a safe harbor for inadvertent, good faith failures, i.e, overwriting, modification, deletion of information.
- FACTS are critical; will not excuse negligent behavior, i.e., as when a Legal Hold is not implemented in a timely or proper manner;

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- BEST PRACTICES - The Lawyer's Contribution

- Help Determine Records Retention Policy and Periods
- Sanctions for spoliation are still a significant concern;
- Lawyers, in conjunction with IT personnel, can help define what constitutes a proper "Record" for retention;
  - Make certain that "Records" are properly retained but that all non-records are promptly destroyed (absent a specific preservation duty like a litigation hold);
  - Saves time and money!

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- Determine the appropriate retention period for all Records, i.e., ESI and documents:
- Generally, the longest of:
  - All legal and regulatory requirements applicable to that Record;
  - Other legal considerations (like Statutes of Limitations); or
  - Operational requirements to have access to that Record.
  - Content of information, not format, determines the retention period
  - Example: More than one retention period for email, depending on its content (contracts vs. employee performance reviews vs. general correspondence vs. party planning, etc.

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Content of information, not format, determines the retention period

– Example: More than one retention period for email may be required, depending on its content (contracts vs. employee performance reviews vs. general correspondence vs. party planning, etc.

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Encourage Gradual Elimination of “Unstructured Junk Piles”

Vast majority of data produced in electronic discovery is from “unstructured sources,” i.e., email, word processing documents, etc.

- Costs of litigation increase astronomically if non-responsive, “junk” data is gathered in response to an electronic discovery request;
- To recity must:
  - Eliminate desk top management;
  - Eliminate limitless storage opportunities;
  - Use automatic archiving protocols with desk top search capability

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Develop a "DATA MAP"

- Committee Note to Rule 26(f) Amendment suggests that parties be prepared at the planning conference to "identify various sources of information that should be searched for ESI" and the "form" in which the ESI should be produced.
- Most corporations are not prepared to respond to this requirement; they haven't quantified what they have stored, where.
- This disclosure is intended to happen very quickly after filing of the Complaint – no time to do it once litigation is commenced.

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Develop a "DATA MAP"

- Pre-litigation planning is essential to cope with this requirement.

Clients should develop a "DATA MAP" or "system inventory" to comprehensively identify the locations of ESI.

- Joint effort of the lawyer and IT personnel;
- Make sure legacy systems are included in the analysis;
- Make sure other outside sources of data are considered, i.e., laptops, blackberries, desk top archives, home computers, etc.;
- Once Data Map is developed, it must be updated/maintained.

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DEFINE TRIGGERS FOR A LITIGATION HOLD!

- Critical aspect of planning;
- Legal hold refers to the suspension of routine deletion of data once litigation is reasonably anticipated or commenced;
- Making hard copy of the data and then deleting will not suffice;
- Relying on individuals to enforce legal holds vs. using non-destructive software an on-going debate;
- Relying solely on individuals is problematic;
- In house counsel have been sanctioned for failure to monitor litigation holds; not enough to communicate at the outset of litigation;

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DEFINE TRIGGERS FOR A LITIGATION HOLD!

Must clearly articulate policy for "anticipated claims;"

Judgment call – preservation duty is triggered by notice that litigation is reasonably anticipated;

Case law is confusing, inconsistent and developing;

Best advice – err on the side of caution;

This requires training for key personnel in supervisory provisions to recognize an anticipated claim and notify executive management;

- Often comes up in the context of employment discrimination cases regarding email communications

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Tracking, Training and Audit of Hold Compliance

- Zubulake decision and its progency demonstrate that it is not enough to send out a legal hold memo and not affirmatively confirm compliance.
- Corporate counsel must make certain that employees understand their duty to preserve and have the requisite training to identify when a preservation duty arises;

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Tracking, Training and Audit of Hold Compliance

- Best practices require the DRP to include an audit function to make certain that the procedures implemented are being followed and employees are complying;
- Company must also document its preservation efforts, i.e., when was the hold implemented, by whom, to whom, in what manner, etc.
- In large companies, a computerized tracking mechanism is typically required.
- Again, corporate counsel is responsible for compliance.

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Process to End Legal Hold Equally Important

- Companies focus on compliance with legal holds but ignore lifting the hold and destroying the data once the litigation is over;
- DRP must address this issue as well.

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- Some real life, case law illustrations of these principles in action:
  - Linnen v. AH Robins Co. – Massachusetts case (1999)
    - Fen-phen personal injury case litigated in MA in 1999 against Wyeth, a pharmaceutical manufacturer;
    - Plaintiff requested discovery of email communications among 15 employees discussing the drug and its medical risks;
    - Wyeth produced hard copy and a handful of emails, claiming it did not have a back up system that permitted ready access to email stored electronically;

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- Linnen v. AH Robins Co. – continued
- Plaintiff discovered that Wyeth was being less than truthful and in fact had more than 1,000 back up tapes that were already segregated and preserved for another litigation;
- Wyeth claimed that it should not be compelled to restore and produce the back up tapes because there was no search and retrieval capability and it would be prohibitively expensive and accused the plaintiff of engaging in a "multi-million dollar fishing expedition;"
- Court rejected Wyeth's claims, ordered it to restore and produce a representative sample of the email stored on the back up tapes at a cost of over $1.75 million dollars in part because Wyeth continued to allow document destruction for 4 months after litigation commenced;
- Court gave a jury instruction to permit the jurors to draw an adverse inference from Wyeth's continued document destruction;

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- Zublake v. UBS Warburg New York case - A civil arbitration proceeding commenced by a disgruntled, former employee, alleging sexual discrimination and retaliatory dismissal;
- At issue was the production of emails between several employees;
- Court required the employer-defendant to produce all emails and to pay 75% of the $275,000 cost to restore the email from back up tape without search and retrieval capability;
- Plaintiff was a broker who earned in excess of $500,000 per year; this was the primary basis for the shared expense ruling;

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- Proctor & Gamble v Haugen Utah case – In an unfair competition case, the defendant moved for sanctions against Proctor & Gamble alleging that it violated its duty to retain relevant email of five key employees by destroying the email;
- Court agreed and sanctioned the company $10,000 ($2,000 for each of the five employees whose email could not be produced);
- Court also granted an order dismissing the case and rendered a directed verdict for the defendant, with prejudice, finding that it was "basically impossible" for Haugen to defend the action without the destroyed email.

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- In re Honeywell International Securities Litigation (NY case)

  In response to a subpoena, the defendant's financial auditor, a non-party to the litigation, produced several thousand documents in hard copy;
- Plaintiff objected, asserting that it was impossible to review the information in any meaningful way and requested electronic copy, the native copy, of the documents;
- The third party objected, claiming that it had provided an adequate index and in any event the electronic copy could only be read using its proprietary software;
- Court ordered that the electronic copy be produced together with an object code copy of the proprietary software;

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- Thompson v. US – Maryland case
- Plaintiff made requests for production of electronic records and email;
- Defendant failed to produce and the plaintiff moved for sanctions;
- The Court issued an Order sanctioning the defendants, precluding the defendants from calling certain witnesses unless they were able to demonstrate that there were no responsive email records;

- Thompson v. US (continued)
- Long after the discovery period closed and on the eve of trial, the defendant announced that it had discovered 80,000 email records responsive to the plaintiff's discovery requests, despite having repeatedly insisted to the Court and counsel that there were no responsive records in existence;
- Court revised its sanction Order to preclude introduction of any of the 80,000 email by the defendant; precluded the defendant from using any of the email to prepare its witnesses for trial or to refresh their recollection at trial;
- Court also permitted the plaintiff to use all or any part of the email at trial and ordered the defendant to pay the cost associated with the plaintiff's last minute review of the emails;
- Court also invited counsel for the plaintiff to make a motion to hold the defendant's attorney in contempt of court;

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- These are just a very few of my favorite cases that touch on this subject;
- There are similar cases in state and federal court in every single state in the US;
- These cases arise in many contexts, but most frequently in lawsuits brought by disgruntled employees for some type of employment discrimination or against departing employees sued for trade secret theft or some other unfair competiton claim;

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- Significantly, in none of the cases discussed did the sanctioned party follow a DRP adopted in good faith;
- Equally important, nor did they have an electronic document archive, with WORM technology and search and retrieval capability to blunt the cost of production;
- If they had, as the evolving case law continues to demonstrate every day, the results would have been very different;
- Implementing a DRP together with an electronic archive solution that meet the guidelines discussed is a powerful defense to the kinds of sanctions imposed in the cases discussed;
- It is no longer an option; it is a required, business "best practice."