

Duty to Preserve: Protect Your Clients, Employees, and Your Firm

You know your clients and your firm are staying within the proper guidelines and following regulations (FRCP, FINRA, HIPAA, among others). The question is can you prove it if you, or they, are sued?

Archiving Considerations for Legal Firms:

Speed is key. How quickly can you access and present evidence? Will your eDiscovery solution take seconds or days? Are you, or your clients, properly archiving all electronic communication? Is there a policy in place? Are your clients or your firm in compliance with that policy? What if something was accidentally deleted? Could you easily retrieve it to prove you were compliant all along?

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Your Duty to Preserve All Electronically Stored Information (ESI)

According to the Federal Rules of Civil Procedure (FRCP), organizations have a "Duty to Preserve" all Electronically Stored Information (ESI). "The amendments to the FRCP describe the duty to preserve potential evidence when litigation can be reasonably anticipated." This presents a unique set of issues for organizations that may become involved in litigation. The duty to preserve requires organizations to preserve email and other electronic communication, meaning you need to archive this data and be able to quickly and easily access, search, place litigation holds, and publish this information. Otherwise, your organization could face fines, sanctions, and other similar penalties.

Important Update as of December 2015

A new version of Federal Rule of Civil Procedure book went into effect December 1, 2015. Subsection 37(e) replaces the previous subpart in its entirety and features a new title: "Failure to Preserve Electronically Stored Information."

In addition to this amendment to the previous rule, Rule 37(e) is accompanied by official Committee Advisory notes that clearly call out counsel to preserve clients' ESI, and that

counsel should. "...become familiar with their clients' information systems and digital data—including social media—to address these issues." The implication of the new law is clear: social evidence is given at least equal weight and import as other forms of ESI such as email and documents. Link to full FRCP text: www.law.cornell.edu/rules/frcp/rule_37

"Duty to Preserve" Case Summaries

Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574, (S.D.N.Y. 2004) (*Zubulake V*): This case outlined the duties of counsel to preserve potentially relevant evidence. This ruling comprises of some of the most often cited arguments in the area of electronic discovery, and the ruling was made prior to the 2006 amendments to the FRCP.

Phillip M. Adams & Assoc., LLC v. Windbond Elecs. Corp., 2010 WL 3767318 (D. Utah Sept. 16, 2010): In this case, the court reaffirmed its earlier holding regarding the trigger for a defendant's duty to preserve, namely that "in late 1999 the entire computer and component manufacturer's industry was put on notice of a potential for litigation regarding defective floppy disk components ("FDCs") by the well-publicized settlement in a large class action lawsuit

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against Toshiba.” Accordingly, for defendant MSI’s failure to uphold its duty to preserve, the court found sanctions were warranted.

Viramontes v. U.S. Bancorp, No. 10-761, 2011 WL 291077 (N.D. Ill. Jan. 27, 2011): This case reiterates that organizations need not keep electronically stored information (ESI) for legal or regulatory purposes until the duty to preserve is reasonably anticipated. As with other evidence, ESI cannot be intentionally destroyed. In fact, businesses have an affirmative duty to preserve relevant ESI.

Apple Inc. v. Samsung Electronics Co., LTD, Case No.: C 11-1846 LHK (PSG), Slip Op. (N.D.

Cal. July 25, 2012): The primary focus of this case was the defendant’s failure to disable the biweekly auto-delete feature of its proprietary email system despite a duty to preserve. Compounding the problem was the defendant’s failure to follow up with its employees to ensure their compliance with the litigation hold. Rather, it was within each employee’s discretion whether to save relevant documents. As a result of these failures, relevant emails were lost. Accordingly, after finding that the Plaintiff had been prejudiced by the defendant’s spoliation, the court ordered that the jury be informed that the defendant had failed to preserve evidence and that they may presume that such evidence was both relevant and favorable to the plaintiff.

“As a health care organization, Health First is always undergoing some sort of litigation process and we needed to gain more centralized control over the archive. Retain satisfied this requirement, and put ediscovery responsibilities directly into the hands of Health First’s legal team. Retain provides instant results to the legal team.”

DANIEL BRAY

System Operation Analyst
Health First

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