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WINNING LITIGATION THROUGH GOOD DOCUMENT MANAGEMENT

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The winner in a business dispute isn't always the party with the best case. Sometimes, who can win depends on which party has the better pre-litigation document management policy.

In today's litigious world, every business is at risk for being sued (or having to sue). At the point a business can reasonably anticipate it may become involved in litigation, the law requires it to suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. In the litigation context, this raises some questions.

- Does the business have a document retention/destruction policy?
- Has the business thought about what kind of records the business generates? This includes hard and electronic copies of work files, reports, invoices, financial records, contracts, correspondence, e-mails, text messages, and other electronic records.
- Are the electronic records stored on a server, or individual laptops, cell phones, or other electronic devices?
- Do company employees know how long they should keep records? Should they permanently delete records? Which records? And, how often should they permanently delete those records?

If a business doesn't know the answers to these questions, then it is not prepared to contest a business dispute. A business owner may know in his/her heart of hearts that his/her employees did everything

exactly right. But, if the e-mails documenting what was done were permanently deleted, they may be left with "he said/she said" as the only hope of proof.

In addition, once it is known that a business dispute may be headed to litigation, the law requires the business take action to make sure documents relating to the dispute are preserved - they cannot be actively or accidentally destroyed. This means making sure that employees who may have documents related to the dispute know they cannot throw away or permanently delete documents until the dispute is over. This means making sure backup systems don't automatically overwrite potentially relevant documents. And, it also means making sure if laptops crash or are repurposed within an organization, potentially relevant information from those laptops is preserved.

The need to preserve isn't just because the business may need the documents to prove its case. In litigation, the other side has a right to examine

all potentially relevant hard copy and electronic documents. If those documents are no longer available and if they became unavailable AFTER a company had a reasonable expectation that the dispute might go to litigation, the company could be sanctioned by the Court. In litigation, this is called spoliation of evidence and the sanctions for spoliation can obliterate an otherwise winnable case. Sanctions can include fines or orders to pay the other side's costs in trying to find the non-preserved evidence. Or, the Judge can order that the jury will be told they can assume the missing evidence would have been damaging to the company that cannot retrieve the evidence and that it would have been favorable to the opposition. The Judge can even go so far as to prevent a party from presenting portions of its case or even order judgment in favor of the other side! In other words, a case can be lost, not because the business wasn't right, but solely because it didn't take appropriate action to preserve evidence.

Two simple steps can make sure this won't happen. First, every business should develop a document management/destruction policy that is tailored to the business. Second, businesses must make sure that if they are contemplating initiating litigation or anticipate being sued, they take steps to prevent hard copy and electronic documents from being destroyed, and all of the people in the organization who have the ability to destroy what could be vital evidence, are made aware of the need to preserve.