



Why Every Business Should Have a Document Retention–Destruction Policy

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We live in a digital age. Most corporate data is now electronic, and the volume of electronically stored information, or ESI, continues to grow exponentially.

With time, a company's ESI naturally becomes outdated and no longer serves any business purpose. But unsure of their preservation obligations, many businesses take an unnecessary and expensive approach of preserving all ESI.

This “preserve everything” approach may seem prudent and conservative at first blush, but the practical results are just the opposite with businesses incurring increased costs for storing unneeded ESI, difficulties in managing records due to the sheer volume of retained data, higher litigation costs due to the expenses associated with searching and reviewing all the ESI, and heightened risks of being sanctioned for failure to properly manage their records.

To be sure, there are times when a company is under an affirmative obligation to preserve discoverable electronic data, including when it has a reasonable anticipation of litigation, or when preservation is required by a statute, regulation, contract, internal policy, industry custom, or third-party discovery request. But absent an affirmative obligation to preserve evidence, it is perfectly permissible for a company to establish policies and practices that provide for the automatic destruction of electronic data.

For example, it is generally lawful to establish a company policy that calls for automatic deletion of emails after a set period of time. So even though many businesses are rattled by the prospect of destroying any ESI, it is now widely accepted that the destruction of ESI is an expected and reasonable step in its life



cycle.

With this principle in mind, formal document preservation and destruction plans set policies and procedures for how employees should handle company information, providing a structured approach toward record preservation and deletion.

Businesses that adopt and properly implement these policies can better manage their ever-increasing volume of ESI while saving costs, working more efficiently by preserving only what is legally required and operationally necessary, and establishing a strong defense against spoliation motions (assertions that the business failed to properly preserve information).

A proper plan will be tailored to the company's needs and legal obligations, will address the company's industry requirements, risk tolerance and internal infrastructure, and will ensure that the company preserves what is required and destroys what is not.

Spoliation

Once in place, the company's formal document retention and destruction plan serves as the primary source for the company and its employees to determine what information should be preserved and what information should be eliminated and when.

The benefits of these plans are innumerable: They make searching for and collecting ESI much more efficient. They allow attorneys to properly advise clients prior to litigation, manage discovery during litigation and strategically seek discovery from adversaries. And they provide a strong defense against spoliation claims.

This last point is critical given that an increasingly pervasive part of the business litigation process is for litigants to explore and seek out flaws in their opponent's preservation efforts. The intended endgame of this expedition is the filing of a spoliation motion, seeking potentially devastating sanctions ranging from monetary penalties to adverse inference instructions and even impositions of default judgments.

But companies that have in place and appropriately utilize these formal plans have a tremendous defense to spoliation claims, because if ESI was destroyed pursuant to a



records retention program before the company reasonably anticipated litigation, it will be extremely difficult for an opposing party to attack a company's motivations for destroying the records.

Indeed, courts routinely deny ESI-based spoliation motions upon finding that ESI was deleted in accordance with a party's document retention and destruction policy. At the same time, courts are becoming increasingly critical of businesses that do not have policies in place for preserving and destroying ESI, often expressing that sophisticated companies are expected to have such plans in place long before litigation arises.

The benefits of a formal ESI preservation and destruction policy cannot be understated. In an era in which businesses employ a wide range of electronic data sources, many of which are intended to be temporary, there should be policies in place to manage the process of retaining and destroying obsolete and unneeded data. Investing the resources to implement a written, comprehensive policy setting forth business procedures for preserving and destroying ESI will likely save tremendous amounts of time and money in the long run.

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