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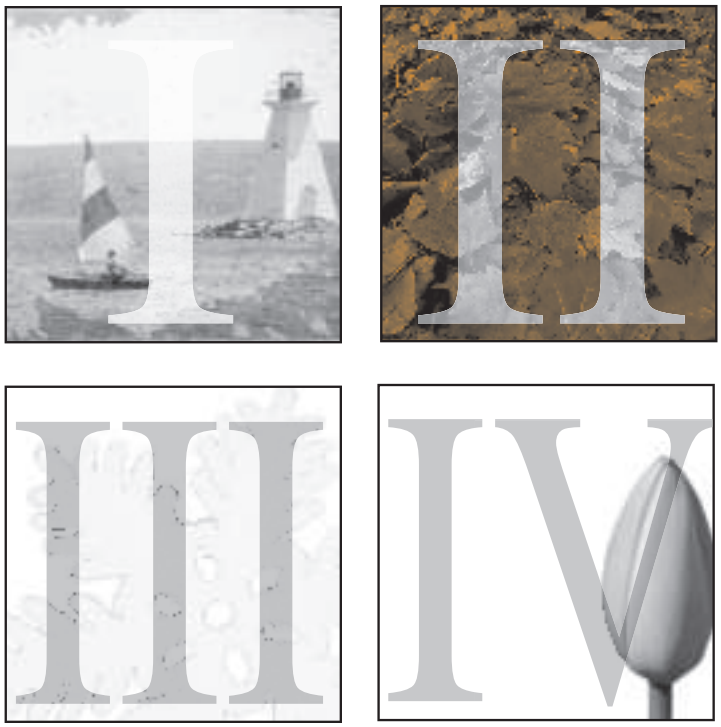

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THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

RETENTION POLICIES FOR ELECTRONIC DOCUMENTS

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Executive Summary

Adopting and maintaining document retention policies is standard procedure for clients and for their lawyers, but electronic documents present different issues than paper documents. Since they take up much less space, they can be stored for much longer periods of time. When litigation is filed or threatened or anticipated, the attorneys also have a responsibility to notify the client not to dispose of documents, to repeat that admonition for the benefit of new employees, and to keep a separate copy in electronic format.

In light of a series of decisions on pretrial discovery motions by the U.S. District Court for the Southern District of New York in the just-concluded case of *Zubulake v UBS Warburg*, the following comments can serve as a general recommendation for the retention of electronic documents by any business, including law firms.

The retention of e-mail messages and other electronic data is becoming frequently involved in litigated issues involving the discovery of electronic evidence. Many companies have adopted a retention policy for electronic data, under which files or messages that are older than a specified period are routinely purged or destroyed. The idea is the same as that behind a document retention policy for paper documents, but as we will see below, there are important differences. As is the case with paper documents, the failure to properly retain electronic documents may have significant effects in litigation. The most serious would be the court deciding, based on an opponent's motion, that the company's actions were so egregious that they deserve an instruction to the jury that the missing evidence should be considered to have been adverse to the party which failed to maintain or preserve it. In Michigan courts, this is enshrined in Model Civil Instruction 6.01, entitled "Failure to Produce Evidence or a Witness."

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In the fifth and last of its series of rulings, the Court, in what is generally known as *Zubulake V* (2004 WL 1620866, 2004 U.S. Dist. LEXIS 13574 – S.D.N.Y. July 20, 2004) found that its previous order regarding the retention of electronic documentation had been willfully violated by the defendant. The key personnel employed by defendant were shown to have deleted numerous documents, some of which were retrieved from backups but others of which were lost.

In light of these facts, the court imposed significant cost sanctions on UBS, and ruled that the plaintiffs would be given the benefit of the adverse inference instruction, to the effect that the destroyed communications contained information detrimental to UBS's position. (This ruling no doubt encouraged UBS in the direction of its ultimate settlement.)

The court also declared that attorneys defending a party which maintains electronic records have certain affirmative and pre-emptive duties with respect to electronic discovery issues, based on their duty under the Federal Rules to manage and coordinate the client's discovery responsibilities. These duties include:

- Issuing a "litigation hold" on the destruction of any documentation, including periodic renewals to ensure that new employees are advised of the directive.
- Direct and particularized communication of the need to preserve documents to the "key players" in the litigation.
- Securing electronic copies of the documentation for themselves, rather than simply having the client maintain copies. (At least one UBS employee had testified that she had been instructed to retain e-mails, but had never been requested to turn them over to counsel.)

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It is helpful for attorneys and for key client personnel — officers, supervisors, managers and persons having risk management responsibilities — to acquaint themselves with these directives from the Zubulake court, as it is likely that other courts will impose the same or similar requirements in the future.

supervisors, managers and persons having risk management responsibilities — to acquaint themselves with these directives from the *Zubulake* court, as it is likely that other courts will impose the same or similar requirements in the future. Indeed, earlier this year, a court in Florida made a similar ruling in the case of *Coleman v. Morgan Stanley*, and the adverse inference instruction is thought to have been instrumental in the resulting $600 million verdict in favor of Ronald Perelman.

For additional information on the *Zubulake* case and on these issues, see Kroll Ontrack's Legal Resources page at *http://www.krollontrack.co.uk/legalresources/zubulake.asp* and an article co-written by the *Zubulake* trial judge, Shira A. Scheindlin and Kanchana Wangkeo, "Electronic Discovery Sanctions in the Twenty-First Century," 11 Mich. Telecomm. Tech. L. Rev. 71 (2004), found at *http://www.mttlr.org/voleleven/scheindlin.pdf.*

Recommendations

Record retention policies should be applied in two categories — a standard policy, applicable in most cases, and a litigation-specific policy, which would be invoked when litigation is filed, threatened, or anticipated. The following will provide some recommendations about the standard retention policy.

It is advisable for any business to adopt and follow a standard records retention policy. The key point is to define the policy in advance and then follow it carefully, not in a sporadic or haphazard fashion. The courts will usually accept a reasonable and properly followed retention policy. If, on the other hand, a court were to learn that no files had been purged for five years, but that the defendant suddenly began to purge files "under the policy" after learning of an imminent lawsuit, it would be more likely to accept the opposing litigant's position that sanctions should apply.

A reasonable retention policy for most businesses would include a provision that documents be retained according to the following schedule:

- Paper documents — 7 years
- Electronic documents, including those converted from paper — 15–20 years

If a particular client's business regularly involves services provided to children, then the retention period for paper documents should be longer, given the fact that injured minors generally have until their 19th birthday to bring a claim.

Retention policies for paper documents are adopted by companies primarily because of the space considerations involved in storing volumes of paper documents. One reason for the recommendation that electronic documents be kept longer than paper

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documents is that the space considerations are much less of a concern. A collection of over 6,000 pages of documents will take up a few feet of shelf space but can be archived to a single CD. A DVD can archive about 47,000 pages of documents.

Another reason, of course, is that it is difficult to predict any outside limit on the retention obligation that will likely be imposed by courts. (One of the earlier orders in *Zubulake* had required that the defendant pay 75% of the significant cost of retrieving old e-mail files from the company's backup tapes because it had deleted them from its active pool of messages, presumably as a matter of routine housecleaning.)

Serious consideration should be given to converting paper documents to electronic documents — that is, archiving them by scanning or (following an older approach) conversion to microfiche format rather than keeping them as paper documents. This can be done in-house or by outside service bureaus. The cost for voluminous collections, however, can be significant.

For those documents that are used on a daily basis in electronic format, they should be retained and archived *in their electronic format*. The capacity estimates used above for files scanned from paper are based on the fact that document scanning at a resolution of 300 dpi (dots per inch) will produce an electronic document that is about 100 kilobytes per page. The same document, left in the electronic format in which it was created (Word, WordPerfect, Excel, etc.) is much, much smaller. The precise size

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depends on the program's architecture, but (as an example) WordPerfect documents of more than ten pages average about 5 KB per page, or about 1/20th of the size of scanned documents.

It is unnecessary in most situations to keep both the electronic archive and the paper documents. As long as the electronic archive is properly created, is backed up and is maintained on suitable media, the electronic version will suffice in lieu of the paper documents.

The following are considerations:

Proper creation — If documents are scanned from paper, they should be scanned at 300 dpi in order to ensure that they are legible. Scanning at 100 dpi produces smaller electronic files and thus will save some space, but the tradeoff is poor legibility.

Proper backups — When a CD or DVD is created, make two or more copies, not just one, and store them in separate locations to avoid loss in the event of fire or other casualty. An archive stored on the business's premises will be subject to the same risks of loss as the originals.

Proper media — Avoiding using inexpensive recordable CDs or DVDs, because they may deteriorate over time. The use of high-quality recordable media is essential if you want to be sure that you can still use the disks in fifteen or twenty years. Avoid putting labels on the discs, because the labels can deteriorate and jam CD and DVD drives on computers.

Further, use formats - such as Acrobat (PDF) - which you know will be compatible and readable well into the future. Your current Acme software system may work just fine now, but if Acme is out of business in ten years, you may not be able to view and retrieve the documentation you have so carefully archived.

Lastly, recheck the archives every five years or so and consider transferring the archived data to new media if it looks like the old media is not in good shape or is becoming outmoded.

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Electronic mail should be kept for the 15 to 20 year period as well. Since e-mail includes traceable threads of messages, including replies to replies and forwarded items, it is a good practice to ensure that all e-mail is maintained rather than purged.

Lawyers very often style themselves as "attorneys and counselors". Representing clients in court after they have been sued is only part of the role lawyers play. An attorney who represents businesses should make it a point to counsel the client on these issues, in advance of litigation wherever possible, to reduce the risk of an adverse ruling during the pendency of litigation.