



Litigation e-Newsletter



Are You Ready for litigation?

Fire drills. Pre-employment investigations. Computer back-ups. Companies routinely plan for natural disasters, human prevarications, and technological meltdowns. When it comes to risk management, though, the prospect of complex litigation involving terabytes of electronic evidence is often overlooked. The bad news is that in terms of human and financial resources, business disruption, and severe consequences, litigation in a computer environment is as significant a risk as any. The good news is that, with some forethought, the risk can be managed.

Litigating in an Electronic World – the Problem

As an increasing number of organizations are moving to paperless transactions, with participants around the globe, the “file of record” will likely be an electronic one. Unlike the contents of a paper file, which are usually kept together, the contents of an electronic file may be spread – and duplicated – across individual p.c.s, network servers, back-up tapes, and the internet. Complicating the matter, it’s cheaper and easier to store large quantities of electronic files than paper files. **The net result can be a lot more data, much of it duplicative, with no easy way to find and review it when lawsuits are filed.** Nonetheless, the common assumption of courts and adversaries is that once created and saved, unless deliberately destroyed, it is near-impossible to lose or delete every trace of an electronic record. The risk of being required to spend a fortune to find and restore old or deleted files, even ones which were saved unnecessarily, is a real one.



E-Mail

E-mail presents one of the trickier challenges, and is also particularly dangerous in the context of litigation. Notorious recent cases have competent lawyers on the hunt for smoking-gun e-mails. **Every organization can count on having to produce all relevant e-mail communications should it, or an employee, become the subject of a court action.**

For individuals with a relatively small flow of e-mail traffic, finding pertinent communications may be a simple matter of copying mailboxes on the company’s e-mail server. A computer search by keywords may quickly reveal the entire universe of

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significant material within those mailboxes.

For large volume users, though, it's not that easy. E-mail systems are not designed to store large volumes of mail. Heavy users are regularly prompted to delete old messages so that room is produced for new communications. These individuals often create folders somewhere other than the e-mail server to file away these older messages if deleting them is not the preferred option. This may or may not be a problem – depending on whether the filing system devised by the user is understood by others in the organization. **If not, responding to a document demand under the time pressure of litigation can be stressful, and expensive.**

The Solution

Being prepared for litigation starts with having an electronic records management system in place that both meets a company's daily needs – and allows it to react efficiently to lawsuits and investigations.

The system will be custom for each company, depending on the nature of its business and operation, but certain features will be common to every good plan.



- **Know Where Your Records Are.** Sounds basic, but in some instances, the move into a paperless world has outpaced thinking on how to manage the new forms of records produced. There are professionals who are experts in records management. They should be consulted, and their recommendations adopted.
- **Don't Keep a Record Just Because That's Easier Than Deciding Whether it's Needed.** Companies keep too much data for the simple reason that electronic storage is cheap, and deciding what to destroy would take time and effort. This is a mistake. Keep what you need to meet your business needs and to comply with regulatory requirements. That's a lot as it is. Do not keep any more than that. Have protocols in place, and strictly adhere to them, so that records are destroyed when they no longer serve a business need or government requirement.
- **Train Employees on How E-Mail Should Be Used.** Don't assume that your employees follow the law journals and know the extent to which e-mail has caused the demise of companies and individuals. They must be taught that these messages do not disappear into cyberspace. If it's not something they would write in a letter, it probably should not be in an e-mail either. Reintroduce employees to their phones – but alert them that digitally saved voice messages have the same permanence as any electronic file.
- **Know What to Do When You Become Aware of a Possible Investigation or Litigation.** Avoid criminal prosecution for Obstruction of Justice, or civil charges or spoliation, by making sure nothing of relevance is

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destroyed, routinely or otherwise, once you know that legal action is contemplated. Make a plan for this eventuality by consulting with your lawyers now. You'll need to quickly advise everyone involved in the contested matter, and those responsible for document retention and destruction, to avoid any action that might alter or delete pertinent records. Consult with a litigation support specialist early in the process so that critical documents are retained, reviewed, and produced in a timely manner.

Being prepared can be the difference between managing a difficult and challenging process – and being overwhelmed by it. **Acknowledging the special risks posed by electronic records is the first step in an effective litigation strategy.**

About the Author:

Suzan Flamm is a Senior Litigation Consultant at DOAR and a former New York State Assistant Attorney General. Suzan brings a wealth of knowledge and experience to her consultative position as a result of her experience as an Assistant District Attorney in New York County, Special Prosecutions and Rackets Bureau, and as a Special Assistant United States Attorney, Eastern District of NY.

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