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- **Protecting Electronic Documents in a Litigious World**

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Protecting Electronic Documents in a Litigious World

Ever said something in an e-mail you probably shouldn't have said? Not to worry – everyone has. But you should be more careful to not say things haphazardly when you know those words may come back to haunt you.

Claimants today know that gaining access to electronic documents may be a vital tool to winning their case. Such things as records of work completed and left un-done, e-mails, letters, and reports can "make or break" the claimant's (and your!) case. They know corporations' are required to have established policies and procedures to properly maintain electronically stored data - and to ensure record preservation upon becoming aware of a claim.

Once you learn of a claim or a situation likely to lead to a claim you need to ensure that all employees are notified to preserve relevant documents for use by defense counsel. (This is called a "litigation hold".) Until the records have been segregated, or copied for defense counsel use, be sure to take steps to prevent deletion, destruction or modification of existing records.

Preservation rules apply to "hard copy" documents as well as to all electronic records stored on all computers you use that may be related to a lawsuit. If you use your home computer, a corporate laptop and a desktop PC, they may all contain information related to allegations in a claim. Documents on all of those computers (and cell phones, Blackberrys', etc.) will also be subject to preservation rules.

Generally speaking, these records need to be preserved until the proscription period has expired. In Ontario, there is a two year period in which claimants' must decide whether or not to file a Statement of Claim. As a result, the very least you should retain records should be two months. If a claim has been filed and you have begun defending the claim, then the files should be kept until after the case has been settled. This often takes years.

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*It's always helpful to learn
from your mistakes
because then your mistakes
seem worthwhile...*

~Garry Marshall~

Once relevant records are identified, they will need to be reviewed by your legal counsel before being released to plaintiff counsel for their use. To prevent voiding any legal privileges or protections that are available your defense counsel will need to undertake thorough scrutiny of the records to ensure that relevant data is not released.

Evaluating Document Retention Systems:

It is one thing to put a plan in place, another to implement the plan and an entirely different matter for all employees to follow the plan. To confirm that document protection/retention processes have become a normal part of corporate culture ask:

1. Is training provided to new employees on records management practices?
2. Is document handling included as one element in employee performance appraisals?
3. Do document naming, tracking, retention and destruction practices clearly follow records from creation through destruction?
4. Is protection of documents in compliance with privacy legislation?
5. Are records and data seen as an important corporate resource and shared freely wherever possible?
6. Are information management practices a regular item of discussion as part of team or department meetings?

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