



**DESTROYING ELECTRONIC EVIDENCE
MAY DESTROY YOUR CASE**

By Shannon Raye Martinez

We've all seen this scenario depicted on a television show or movie - the large company shreds millions of documents to hide key evidence against them in a lawsuit. In the real world, this kind of behavior may result in a judgment being entered against you without the opportunity to defend yourself at trial.

Most people are aware that destroying documents relevant to the lawsuit may be a bad idea. But, what about deleting your emails or other documents that exist in electronic form? Courts have struggled with this question, and have occasionally been very harsh on litigants who have destroyed evidence, even if they have done so by mistake.

The Federal Rules of Civil Procedure ("FRCP") were recently amended to require production of "electronic" information. Under the new rules, producing the hard copy of the document may not suffice if there is additional information stored on the electronic version. Electronic versions of documents often disclose such information as when the document was created, who created it, and what information was deleted or added to the file. This information means that not only is the final version of a document relevant evidence, but also each draft, including electronic comments and tracked changes, if available.

Because electronically stored information may be requested under the FRCP, you must act to preserve it once you are on notice that you may be sued. Many jurisdictions have issued sanctions against litigants in the past few years for failing to make sure that procedures were in place to preserve evidence that may be relevant to a developing dispute. Sanctions include awards of attorney fees and instructions to the jury that all evidence that has been destroyed is presumed to be adverse to the case of the party who destroyed it. For example, an Illinois court sanctioned a defendant corporation because management failed to ensure that the employees were following the company's order to not delete emails.

The Ninth Circuit has also sanctioned parties for destruction of electronic evidence. In September 2006, the Ninth Circuit affirmed a Washington District Court decision awarding \$65,000 in monetary damages to the defendant and dismissing plaintiff's case for destruction of evidence. In that case, the plaintiff deleted files from a laptop issued to him during his employment with defendant. The court rendered this harsh punishment because the court found that the plaintiff destroyed the files in bad faith because he was on notice that the files were potentially relevant to the case.

Litigants now have a duty not only to preserve paper documents, but all electronic versions as well. Even an inadvertent destruction of any potentially relevant evidence could lead to sanctions, including an award of attorney fees against you. Companies should create and implement procedures to ensure that all forms of evidence are preserved whenever it appears that the information may be relevant to a pending dispute.

If you have any questions regarding this topic, please feel free to give us a call.