



# Law Trends Today

## Employers Beware: Emails Can Change the Outcome of Lawsuits

By Jennifer Kampsula

The traditional office no longer contains just paper files in a central location; instead, it is virtually anywhere an employee travels with a laptop, personal digital assistant (“PDA”), cell phone or any other electronic device allowing an employee to work away from the office. It is common practice to conduct work through emails instead of letters.

When writing emails, employees probably never expected them to become the subject of litigation, especially if deleted and sent to trash. However, if an employer ends up in litigation, those emails may need to be produced in the court process, known as discovery, just like any other document in a file.

To keep pace with the ever changing world of technology, Federal Rules of Civil Procedure (“FRCP”) amendments addressing electronically stored information (“ESI”) took effect December 1, 2006. The new FRCP rules require both sides in a lawsuit to disclose the location of electronically stored information (“ESI”) that may be used to support a claim or defense. Electronic data is now an important part of proving a position in a lawsuit.

### A \$29 Million Mistake

Not turning over electronic data can have serious and costly consequences for an employer. Prior to the

FRCP amendments, Laura Zubulake brought a relatively routine discrimination case against her employer for gender discrimination and illegal retaliation. See *Zubulake v. UBS Warburg* 217 F.R.D. 309 (S.D.N.Y. 2003). Yet, the

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case was anything but routine with five opinions issued addressing electronic discovery. After months of costly discovery, Ms. Zubulake’s attorney successfully argued that her employer failed to preserve relevant emails and destroyed emails after the court ordered the emails preserved. Consequently, the court ordered that the jury could infer that the missing emails would have supported Ms. Zubulake’s claim. At trial, Ms. Zubulake was awarded \$29 million.

Following *Zubulake*, the FRCPs were amended making it clear that ESI must be produced. It also appears that the rules have attempted to help the party that acts in good faith but inadvertently destroys relevant ESI evidence: “(a)bsent exceptional circumstances, a court may not impose sanctions...for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.” Regardless, parties must diligently protect any ESI that could be relevant in litigation.

### What You Should Do

What does this mean to employers? Be proactive and

be prepared. Every employer must be familiar with the use of electronic information in their business and set forth basic protocols for employees to follow.

**First**, appoint a contact person in your office to be familiar with and monitor ESI. The contact must know where all ESI is stored, the format in which it is stored, the ESI that is easily accessible and the ESI that is retrievable from stored data.

**Second**, know where your documents are stored, which is not as simple as it sounds. For instance, information may be located outside the office computer, such as in a home personal computer. Do your employees work on laptops or PDAs? Know what ESI is accessible and inaccessible. Deleting a document does not mean that the document is erased from the computer. Instead, deleting a document merely creates more room on a hard drive allowing that

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document to be overwritten when there is no more space. Until the hard drive runs out of room, that document may very well be retrievable.

**Third**, develop a document retention policy. How long will you store ESI? Where and how will you store

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ESI? Documents should only be destroyed as a matter of routine policy. Otherwise, an innocent deletion may look much worse when discovered in litigation; considering the advances of technology, the document itself, or evidence of its existence, will eventually be discovered.

**Fourth**, educate all employees regarding ESI policies and enforce the policies. It is not enough to send out a memorandum stating the policy. You must ensure that the policy is being followed by employees.

**Fifth**, if litigation is initiated or anticipated, place a litigation hold on all relevant documents. In other words, directly communicate to key players involved that all relevant documents must be preserved. If there are routine policies in place to delete old data, suspend the policies. Legal counsel will assist you with the particular requirements.

While the FRCPs only apply to litigation in federal court, similar rules will eventually exist in state court. In August 2006, the Conference of Chief Justices approved guidelines for state courts to follow in addressing discovery ESI, which tend to follow newly implemented FRCPs. Bottom line, keeping track of ESI should be a part of every good business practice.

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If you have a question about how electronic discovery affects your business, please contact us.

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