



**TUCKER ELLIS & WEST LLP**  
ATTORNEYS AT LAW

**CLIENT ALERT**

**FEBRUARY 2007**

**THE SHIFT FROM PAPER TO ELECTRONIC BUSINESS OPERATIONS REQUIRES ADOPTION  
OF BEST PRACTICES FOR MANAGEMENT OF ELECTRONIC FILES**

**INTRODUCTION**

By now, you probably know that effective December 1, 2006, new legal rules went into effect that impact how litigation is conducted in federal courts. The rule changes reflect the societal shift from creating and using paper documents to conducting business electronically. Business organizations must understand precisely how they manage, store and retrieve electronically stored information (“ESI”) to prepare adequately for potential lawsuits or requests for information from governmental agencies. This Client Alert provides information to our valued clients regarding what measures you should consider in response to these rule changes.

The amendments to the Federal Rules of Civil Procedure (“FRCP”), which govern the conduct of litigation in federal courts, represent evolutionary change. Parties have always been responsible for searching and producing relevant electronic files during litigation. However, the FRCP amendments recognize that now almost all documents are created electronically, and require that organizations undertake proper planning to discover, process and review all ESI in preparing to prosecute or defend claims—or risk incurring sanctions for the loss of ESI.

There are three primary actions (discussed below) to consider. First, you should understand and map your information systems. This includes conducting an audit of all of your current and legacy (i.e., old, offline systems) computer systems, files and back-up media. Second, you should have a Records and Information Management (“RIM”) policy in place at your business that demonstrates how paper and electronic records are maintained

(and destroyed) according to set retention schedules. Third, your organization should have a Litigation Response Plan. This requires creating a team of Information Systems (“IS”) and legal professionals trained and prepared to initiate a Litigation Hold to preserve all relevant paper and electronic records if litigation, a government investigation or an audit is initiated or reasonably anticipated.

**STEP ONE: INVENTORY YOUR ELECTRONIC SYSTEMS**

To respond to the FRCP amendments, companies must inventory and map information systems. At a minimum, your IS department should create charts, diagrams and tables that identify the types of systems, information and storage media; where information is stored (physically and electronically); who is responsible for it; and how the data is maintained. This information is required knowledge by parties and attorneys at the initial stages of litigation under the new federal rules.

**STEP TWO: UPDATE YOUR RECORDS AND INFORMATION MANAGEMENT POLICY**

Inventorying your electronic systems will tell you whether your RIM policy is working effectively. You will learn if electronic files are being retained and deleted in conformance with your existing policy or if old back-up tapes or other electronic files that do not require retention under your RIM policy are hiding in storage cabinets or on hard drives. A recent, now famous case involved the late production of back-up tapes. At trial, a jury ordered the defendant to pay \$850 million in punitive damages. In part, this award was for discovery violations, including

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*The Shift from Paper to Electronic Business Operations, continued*

failing to produce email from the back-up tapes. You may learn that your RIM policy should be updated to address how electronic files are to be maintained as company records. The primary challenge facing records managers today is how to accurately file emails that qualify as company records, but are never printed and maintained in paper form. Often times, outside consultants or software are required to manage these issues.

### **STEP THREE: CREATE A LITIGATION RESPONSE PLAN**

You must be prepared to act immediately and effectively to direct all IS managers and custodians in control of relevant electronic data and paper files to halt the routine destruction of that information once litigation, a government investigation or an audit is initiated or reasonably anticipated. Otherwise, seemingly routine destruction of electronic or paper files may subject you to sanctions for failure to take appropriate actions to preserve evidence. A Litigation Response Plan with procedures for initiating an immediate Litigation Hold will enable you to achieve this goal. Moreover, it will assist your attorney in proving that your organization attempted to preserve all relevant evidence, and it lessens the chance that a court will order sanctions against you for the inadvertent deletion of electronic records.

### **CONCLUSION**

Your organization's ability to successfully prosecute or defend claims will be enhanced by creating a team of IS and legal experts who respond to these rule changes. Steps taken now will ensure that proper procedures regarding the creation, retention and deletion of electronic data exist in your organization. Then, once litigation is at hand, you will be ready to preserve, process and produce responsive data.

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