
ALERT - HANDLING AND PRESERVING ELECTRONICALLY STORED INFORMATION AND LITIGATION

California law requires that individuals and businesses who get sued must take active steps to preserve and maintain Electronically Stored Information (“ESI”) that in any way relates or refers to the subject matter of the litigation. The duty includes backing up, preserving, and not deleting any ESI.

With a significant portion of transactions and communications being conducted through electronic devices, it is essential that you and your attorney preserve and maintain that information throughout the entirety of litigation. Unlike traditional evidence retention methods of physically filing and storing documents and papers, ESI often requires additional oversight. Additionally, what falls under the umbrella of ESI goes beyond just emails and electronic transactions. ESI includes text messages, instant messages, social media posts, and voicemails, in addition to all digital files. For example, if you are using QuickBooks, Microsoft Money, or other accounting software at home, you also have a duty to preserve those files.

The law also imposes a duty to retain old devices containing ESI. This means that if you are planning on upgrading a phone or replacing a computer, you cannot dispose of the old devices until the litigation is resolved. Additionally, you must retain old hard drives, cd’s, DVD’s, flash drive, SD drives and any other device that can store ESI. Beyond physical objects, emails, texts messages, and transaction records cannot be destroyed or deleted. Essentially, if there is any semblance of a doubt regarding the importance of ESI, the best practice is to protect and retain the

information. Do not delete or overwrite any such information without consulting with counsel.

Beyond saving the information, we recommend that you work with your Attorney to back up all pertinent information. It is in the best interest of your Attorney to be able to explain to the court how the information was properly preserved.

Please be aware that failure to comply with these practices can detrimentally affect your interests in the litigation. The court has the authority to administer penalties when they find improper destruction of evidence or potential evidence. Common penalties and sanctions issued by courts include, evidentiary sanctions, monetary sanctions and requiring the violating party to restore the lost or damaged information, which can become very costly. Additionally, penalties and sanctions can be levied against the attorney as well.

Please note, these rules and requirements are United States specific and as highlighted below, the European Union (“EU”) has an alternative view on the preservation of ESI. The EU sees data privacy as a basic human right and has made significant efforts to give individuals the right to control their electronic profile. There are essentially only two acceptable means to process this information: first the individual provides unambiguous consent and second there is a legal obligation for the disclosure. However, once that first hurdle is met, if you are conducting litigation in a non-EU country and hoping to retain ESI from an EU country, the EU must view your country as maintaining “adequate” data privacy protections. Spoiler alert, the U.S. currently does not maintain such protections in the

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view of the EU. Fortunately, there are further means to avoid this setback but it is not without additional effort.

When in doubt, keep the information and do what you can to properly back it up as well. As always, contact us if you have questions or need additional information.

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Authored by:

Horace W. Green
Cullen L. Schlievert
T: (925) 944-9700
hgreen@bpbsllp.com
cschlievert@bpbsllp.com

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