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Electronic Information Systems: The Evolution of Records Retention Policies

Authors: Clinton P. Sanko

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Intel's document retention policy demonstrates a shift in records retention and litigation. In the paper world, destruction of corporate records usually was accompanied by some evidence of malicious intent—like Lieutenant Colonel Oliver North and Arthur Andersen shredding stacks of documents in apparent attempts to thwart investigation efforts.¹

In the new electronic world, information can be destroyed even absent such affirmative action because the vast majority of corporate records are electronic. Now, even routine operation of an Information Technology (IT) system can result in the destruction of electronically stored information (ESI). The new Federal Rules of Civil Procedure (FRCP) addressing ESI and its treatment in federal cases recognize this reality:

The 'routine operation' of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, ***a feature with no direct counterpart in hard-copy documents***. Such features are essential to the operation of electronic information systems. (emphasis added)

The "routine, good faith operation" of IT Systems must be suspended in the case of litigation: "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" The duty to preserve "extends to those employees likely to have relevant information — the 'key players' in the case."²

1. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698-702, 125 S.Ct. 2129, 2132-33, 161 L.Ed.2d 1008 (2005).

2. Judge Scheindlin of the United States District Court for the Southern District of New York famously set forth preservation standards for ESI in the context of a dispute involving UBS Warburg. See *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003) ("*Zubulake IV*").