

IT'S NOT JUST ABOUT PAPER ANYMORE

**E-MAIL—THE NEW SMOKING GUN IN
EMPLOYMENT LITIGATION**



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ELECTRONIC COMMUNICATION IN THE WORKPLACE

- The explosive growth of the Internet and electronic communication is creating a new myriad of issues in the employment setting.
- Common examples of electronic communication include: word processing documents, excel spreadsheets, powerpoint, and e-mail.

E-mail Is Particularly Concerning Because:

- People express thoughts, opinions, and sentiments that would not be revealed in a traditional writing.
- Tone has the potential of being misinterpreted.
- Statements may be taken out of context.
- Messages are easily copied and forwarded to many people.
- It is long-lasting and easily obtainable, even if deleted from the sender's computer.

EMPLOYMENT LITIGATION AND DISCOVERY OF ELECTRONIC COMMUNICATION



Technological Advances Create Anxiety and Concern for Employers Because:

- Broad discovery requests
- The possibility of the smoking gun (i.e. failure to hire and sexual harassment/retaliation claims of action)
- Plaintiff's insider status

Amended E-Discovery Rules of Procedure:

- Federal Rule of Civil Procedure 34(a) and Michigan Rules of Court 2.302 make it clear that disclosure and discovery extend to all electronically stored information.
- **Electronically Stored Information (“ESI”)** includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations stored in any medium from which information can be obtained...” F.R.C.P. 34(a); MCR 2.302.
- The definition of ESI is broader than the prior definition of “document.” The new definition of “discoverable information” is intended to cover new technologies that may develop.

HIDDEN/INACCESSIBLE DATA

- Both the federal and state rules of discovery state that, “a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” F.R.C.P. 26(b)(2)(B); MCR 2.302.

Duty to Preserve ESI

- Certain events will impose a duty to preserve evidence or otherwise justify suspending ESI destruction, such as:
 - During litigation
 - That period before litigation when a party **reasonably should know** that the evidence may be relevant to **anticipated** litigation.

Spoilation Doctrine/Adverse Inference

- Spoilation is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.
- Possible consequences for destroying a document after a duty to preserve is triggered, include the following: sanctions; fines; dismissal of a plaintiff's case; a default judgment against an offending defendant; or an adverse inference.

Spoilation Doctrine/Adverse Inference

- A court may impose an “Adverse Inference” of 1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; 2) that the records were destroyed with a culpable state of mind; and 3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. See *Zubulake v UBS Warburg, LLC*, 229 FRD 422 (SD NY, 2005).

Litigation Hold

- Employers must take “reasonable” steps to preserve relevant information.
- Determine the scope of the information to be preserved (i.e. identify relevant subject matters and employees; identify sites of potentially relevant information such as hard drives and backup tapes).
- Be familiar with the IT system and document retention policies to effectively manage discovery preservation and production.

Litigation Hold

- Issue the “litigation hold” in writing. This should be periodically re-issued so that it is fresh in the minds of employees.
- Direct communication with key players in the litigation is essential.
- Instruct employees to produce electronic copies of their relevant active files Instruct employees to produce electronic copies of their relevant active files.
- Store relevant backup tapes, etc. in a safe place.

Safe Harbor Rule

- Both federal and state rules of discovery create a safe harbor rule.
- Fed. R. of Civ. Proc. 37(f) and Mich. Rules of Court 2.303(B)(5) provide that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

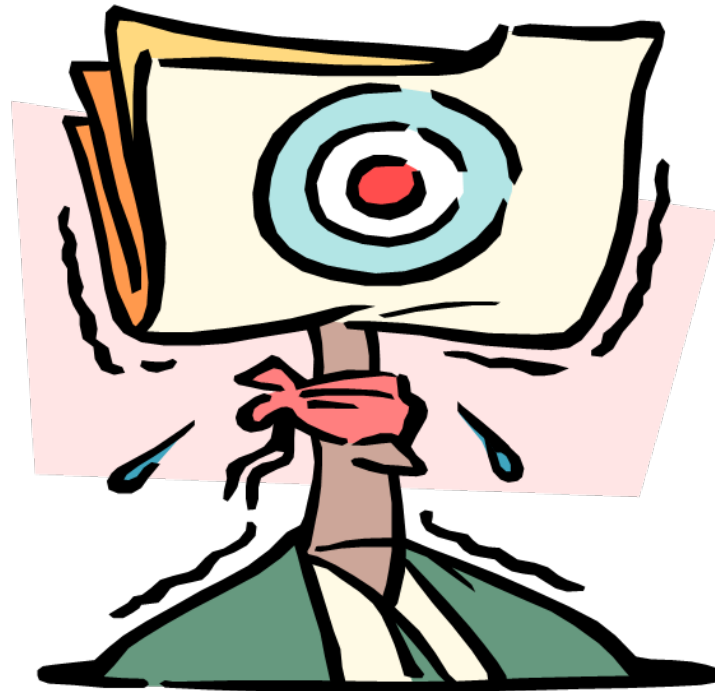
Safe Harbor Rule

- The “safe harbor” provision applies when information is lost or destroyed under a routine electronic information system, if the operation of the system was performed in good faith.
- Good faith may be shown by a party’s actions to attempt to preserve information as part of a “litigation hold” that would otherwise have been lost or destroyed under an electronic information system.

Duty to Preserve ESI

- Employers must take *reasonable* and *good faith efforts* to retain information that may be relevant to pending or threatened litigation.
- The duty extends to all employees who may have relevant ESI.

FREEDOM OF INFORMATION ACT



The Freedom of Information Act, MCL 15.231, *et. seq.*

- Employees must also be cognizant of the potential disclosure of e-mail and other electronic documentation through a request for information pursuant to Michigan's Freedom of Information Act ("FOIA"), MCL 15.231, *et seq.*
- The FOIA requires a public body to disclose, upon written request, all non-exempt records that are covered under the Act .

The Freedom of Information Act

- The FOIA ensures that citizens obtain full and complete disclosure of Michigan government records. The FOIA states as follows: All persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act.” MCL 15.231.

The Freedom of Information Act

- Those requesting information through the FOIA are not required to show a need for the information.
- Generally, the FOIA will require full disclosure of public records in the possession of a public body so that they may participate in the democratic process. MCL 15.231(2).

The Freedom of Information Act

- A public record is defined as: A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. MCL 15.232(e).
- Under the FOIA, computer records constitute “public records” and therefore may be subject to disclosure. *Farrell v City of Detroit*, 209 Mich App 7, 14 (1995).
- Thus, citizens have broad rights under the FOIA to access public records, limited only by the statute and its exemptions.

Records Retention Considerations

- Michigan law requires that all public records be listed on an approved Retention and Disposal Schedule that identifies the minimum amount of time that records must be kept to satisfy administrative, legal, fiscal and historical needs. MCL 399.5 (Historical Records and Sites Act).
- Public records cannot be destroyed unless their disposition is authorized by an approved Retention and Disposal Schedule

Records Retention Considerations

- **Non-record** materials may be destroyed as soon as they have served their intended purpose. Examples of non-records materials include: drafts, duplicates, convenience copies, and miscellaneous notes and memoranda which does not relate to the legal and functional responsibilities of the public agency.

Records Retention Considerations

- **Suspending Destruction of Public Records**: public institutions are not precluded from retaining records for longer than the specified period of time. Indeed, retention may be required for purposes of litigation discovery or a FOIA request.

Records Retention Considerations

- **Criminal Penalties for Willful Destruction of Public Records**: criminal penalties may be imposed for the willful destruction of public records. Under the Michigan Penal Code, any person who willfully destroys a public record or any part of the same is guilty of a misdemeanor and may be subject to imprisonment of not more than 2 years or a fine of not more than \$1000.00. MCL 750.491.

Before Hitting “Send”:



- Bear in mind that e-mail never dies.
- Write in the same way that you would for any other form of communication. Don't use e-mail to make negative comments, opinions, or sentiments about a colleague or employee.

Before Hitting “Send”:

- Before you hit that “Send” button, imagine your e-mail on the front page of the Flint Journal or FREEP.com. If it passes that test, you should be in the clear.
- Send group mail only when necessary and only to those who need the information.
- Remember that your deleted e-mails can be recovered forensically, either from your machine or from your employer’s server.

Before Hitting “Send”:

- Be cognizant that even writing an e-mail to someone you trust that contains sensitive, mean, or potentially embarrassing information has the potential of being disclosed.
- Once you’ve sent an e-mail, you have no control at all over the recipient, who may choose to forward it, or to reply to you but blind carbon copy others, in which case they too have your underlying e-mail.

Before Hitting “Send”:

- When drafting e-mails to co-workers or subordinates to advise them of a situation keep to the facts as you know them. Don't jump to conclusions in an e-mail until you have a full understanding of the matter.
- Read message a couple of times for clarity and tone before hitting the “Send” button.

Before Hitting “Send”:

- Discussions about sensitive matter (i.e. disagreements, discipline, layoffs, firings, etc.) should be off limits to e-mails. Instead, resort to the “old” method of communication such as a face-to-face meeting or telephone conference. When addressing sensitive matters, tone is important and e-mail creates the ability for misinterpretation.

Do Use E-Mail To:

- Recap spoken conversations (i.e. “As we discussed this morning...you will provide...by...”).
- Transmit regularly scheduled newsletters, reports, etc.
- Set up meetings and prepare attendees (i.e. confirm meeting times and dates; review meeting materials).



Any Questions or Comments?