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NOVEMBER CLIENT ADVISORY

Lawsuit Danger Alert: Be Careful How You Dispose of Old Records!

Changes in law that take effect this December will increase your chances of being sued for unmanaged attrition of records when litigation is likely. Protect yourself now!

As if you didn't have enough to worry about, litigation-wise, a threat is moving to the forefront. It's called "spoliation of evidence," and it's been around for a while—but upcoming changes in the federal rules of civil procedure are making this risk even riskier.

Without any reference at all to the actual merits of a controversy, businesses have suffered the disaster of an adverse verdict of thousands, millions, or even *billions* of dollars, when a court determines *in hindsight* that "relevant" records were destroyed with "culpable intent" after the company had "reason to know" that it may be sued in a particular matter. Several recent, high-profile cases indicate that these kinds of claims are catching on.

As of December 1, 2006, the magnitude of this risk will increase dramatically for those businesses that ignore the legal requirements imposed upon them by amendments to the Federal Rules of Civil Procedure. In the works for over ten years, the rule amendments are *intended* to "catch up" with the dramatic and far-ranging effects of evolving information technology and the way businesses communicate and handle electronically stored information (ESI).

In practice, these amendments will focus attention on the possibility of raiding corporate larders, not based on the merits of an actual claim, but based on shortcomings of the architecture and management of modern information systems. This "feeding frenzy" is likely to splash over into litigation in the state courts as well. Not paying attention to these developments can increase your chances of becoming a victim. You *can* and *should* take steps to manage this risk.

The courts have acknowledged that businesses have a right to purge information from their records, both paper and electronic. However, deliberate destruction (or even "negligent" purging in some jurisdictions) will not be tolerated once the business "has reason to know" that litigation is likely. This does not mean receipt of the suit papers, but can go back in time as far as the making of a claim or demand, or occurrence of an event indicating the "likelihood" of litigation.

Once this threshold is reached, a business, its in-house counsel, *and* its retained outside counsel all have an *affirmative duty* to communicate a *"litigation hold"* on the destruction of information to *"key witnesses, IT, and paper records managers," and to others who may possess information relevant to the litigation.* Businesses and their lawyers have suffered reprimands, sanctions, and imposition of liability for failure to discharge this duty. Chillingly, even attorney work product and attorney/client communication privileges can be deemed set-aside by the "crime-fraud" exception, following in-camera review by the court.

We won't go into all the technical details here, but suffice it to say that honest mistakes can lead to disastrous consequences. We all know that broad legal wording and aggressive litigators are a lethal combination for companies with deep (and even not-so-deep) pockets. So what can *you* as a businessperson do to protect yourself from this exposure?

- Have a disciplined, well-defined information storage, management, *and destruction* policy. So long as the information is purged routinely, pursuant to such a system, and without "reason to know" litigation is likely, you are within your rights in purging information.

- Have a documented "litigation hold" procedure in place. Make sure it's broadly construed by your management and employees so that you can demonstrate to the court that a robust effort has been made, and nothing has intentionally been left outside of the "spotlight." Make sure key witnesses, IT, and document storage personnel are officially noticed, and that the hold is in fact observed (issue "reminders" of the hold from time to time).

The bottom line? We do not want our clients to become victims of this coming fad, nor do we want to become victims ourselves. We look forward to your successfully managing this risk and will assist in any way that we can.

P.S. To read a slightly more detailed version of this article, please visit www.bernsteinlaw.com/lawsuitalert.

Two New Employees Join Bernstein Law Firm

Please join us in welcoming two new professionals—Rita DeCaria and Dan Durishan—to the Bernstein team.

Rita is our new director of marketing. An attorney whose background includes employment in both law and corporate marketing firms, she will work to bring inspiring, revenue-boosting ideas to our clients. If Rita can help you or your clients—perhaps by coordinating a teleseminar or special speaking event or by providing articles for your newsletter—don't hesitate to let her know. She is here to serve you!

Dan has been hired as manager of Bernstein's Creditors' Rights Practice Area. Our clients will reap the benefits of his extensive background in all areas of the credit industry.

To learn more about Rita and Dan, please visit the "News" link at www.bernsteinlaw.com. We are confident that they will prove to be outstanding assets to our attorneys and—most importantly—to our clients.

Bernstein Law Firm, P.C. is a family-owned and managed law firm located in Pittsburgh, Pennsylvania. The firm concentrates in Creditors' Rights, Business Bankruptcy and Business Law. In addition to its more than forty years of experience in these areas, the firm's capabilities include Banking, Administrative, Real Estate, Civil and Appellate Law.

Bernstein Law Firm also has more board-certified Creditors' Rights specialists than any other law firm in Pennsylvania.