Private corporate electronic data can be laid bare in divorce litigation

Electronic evidence has become the new smoking gun in divorce litigation. Electronic devices such as smart phones, iPads and computers hold a treasure trove of evidence. When an employee or business owner uses a company-owned electronic device or account, the company could find itself on the receiving end of a subpoena requesting emails, texts and company records. In addition, the company might receive a "litigation hold letter" requiring it to take formal steps to preserve certain electronic data relevant to the divorce litigation. The most common data sought are email communications, texts and financial records along with company-owned electronic devices.

Employer's obligation

Because almost all data are now maintained and transmitted electronically, divorce lawyers are routinely demanding electronic files be produced during the pretrial discovery process and requesting that data on electronic devices be copied to preserve evidence. In 2006, new federal laws included the discovery of electronic evidence in litigated cases. Last year, North Carolina adopted laws to regulate the preservation and production of electronic discovery including the cost and burden of extracting, preserving and producing electronic files.

When a company receives a subpoena requesting corporate information in a divorce case, its first reaction usually is to object to producing the information. However, either one of the divorcing parties can seek to join a company as a party to the lawsuit so the court will have jurisdiction to order a company to take actions such as producing emails or electronically kept financial data. A number of state and federal judges have imposed severe penalties on corporate litigants that did not comply with preserving and producing electronically stored information. Even if a company is not made a party to a lawsuit, if it receives a subpoena, it is required to produce what is requested unless a court orders otherwise. Failure to do so can result in severe penalties.

It is important for a company to ensure that it fully understands its legal obligation to preserve and produce electronic evidence. This is an emerging area of law, and a corporation's obligation under the law is changing frequently. Smaller companies tend to be more informal in their policies and procedures. The law applies equally to large and small companies. However, a court may order that the cost and burden of preserving and producing certain requested electronic evidence is too great for a smaller company, and it may shift that cost to the requesting party.

Duty to preserve evidence

Let's say Mr. Lovemore is an owner in a technology company, Good Tech Inc., and is getting divorced. Good Tech along with its corporate counsel, CPA, office manager and business partners received a litigation hold letter from Ms. Lovemore's attorney advising it will be seeking emails between Mr. Lovemore and his co-worker Ms. Friendly, Mr. Lovemore's company cellphone and computer and the company's financial records for the past five years. The letter advised the key players not to destroy any data requested and to ensure it was secured for future production. Mr. Lovemore's business partners object because the data contains privileged information and would be burdensome and costly to preserve and produce. Furthermore, the partners feel they have no obligation to comply since the company is not a party to the lawsuit. What is the company's obligation to preserve the requested information?

Once a company reasonably anticipates that it possesses information or devices that may be requested in litigation, or when it receives a litigation hold letter, it should secure the information requested and suspend its routine document retention/destruction policy. Even if a company objects based on any number of reasons includ-

ing cost, burden or confidential information it should secure the information until a court rules on what information should be produced and how.

Common mistakes

Three types of e-discovery mistakes are common in litigation. First, while lawyers may communicate with key people to the litigation, often communication is not made with the people in charge of retaining and destroying electronic data. As a result, information is often lost. In the example of Good Tech, the company should inform its information technology department of the litigation hold letter.

Second, even when the appropriate IT people are contacted the standard reply is that it is burdensome and too expensive to preserve and produce what is being requested. Blindly accepting an objection by IT to producing the information without inquiring further about the actual cost and burden could lead to sanctions by a court, which could rule that the information be produced in full or in a limited fashion.

Third, he who hesitates is lost. Electronically stored information can be altered, destroyed or changed intentionally or systematically. A failure to communicate with the appropriate people in a timely fashion can result in the irretrievable loss of information. If a company does not take steps to preserve the relevant information it will not be able to identify and ultimately produce it later, which could result in sanctions.

Steps to ensure compliance

There are a number of steps that companies can take to ensure compliance with the preservation obligation. First, whenever a company may be subject to a subpoena or joined as a party in litigation it should issue a "litigation hold" to anyone in its organization that may possess or control data or devices that could be relevant. In the case of Good Tech, it should issue a litigation hold to all key players to ensure that emails between Mr. Lovemore and Ms. Friendly are secured and not deleted through a systematic purge. Further, it should copy all data contained on the company-owned cellphones and computers including texts, emails and files and ensure that any financial documents existing at the relevant time be saved in their current format. The litigation hold should be periodically reissued so new employees are aware of it, and it remains fresh in the minds of all employees.

Second, the company should routinely communicate directly with employees likely to have relevant information. It is particularly important that the preservation duty be communicated clearly to those key players and that they are periodically reminded the preservation duty is still in place.

Finally, the company should instruct all employees to produce electronic copies of their relevant active files. It should make sure all backup media that may contain relevant data is identified and stored in a safe place. One of the main reasons that electronic data is lost is because of ineffective communication with the right people in a timely manner. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, a company eliminates the possibility that such tapes will be inadvertently destroyed or recycled.

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Have an electronic-readiness plan

Because the duty to preserve electronic evidence is an emerging issue, many companies underestimate the demands the legal system makes in terms of ensuring the preservation and production of digital evidence. Companies should be proactive in developing policies and protocols to preserve and protect electronic data in the event of litigation. Companies can find themselves pulled into divorce litigation against their will. A readiness plan will help protect the company from inadvertently making costly mistakes.