

## “Litigation Hold” More Important in E-Discovery Era

By Terry A. Wills, Esq.



With the onset of recent amendments to the Federal Rules of Civil Procedure regarding e-discovery, companies that maintain document retention and destruction policies as part of an overall document management plan should consider specifically suspending destruction policies with respect to relevant data when litigation or claims arise. Courts have imposed sanctions for even inadvertent destruction of evidence. In *Clark Construction Group v. City of Memphis*, 229 F.R.D. 131 the court imposed a sanction against the City of Memphis for disposing of discoverable data (including emails), even though the City's actions were not willful. The electronic data was discarded because one employee did not believe it was relevant and the City apparently did not instruct its employees or agents that they should not discard or destroy documents that might be

considered relevant to the case. The court held that because there was a duty to preserve records “it was incumbent upon the City to establish a procedure that would eliminate the likelihood that potentially relevant documents would be destroyed.” Given the court's ruling, it is important that a “litigation hold” or record retention procedure should be part of a preservation plan to avoid the inadvertent destruction of data and the potential for sanctions.

In a perfect world, companies should work with legal counsel to put together a “hold” letter that (a) includes a statement that all documents in the relevant time frame relating to the litigation must be preserved and identifies the sources of possible evidence (i.e., correspondence, memoranda, faxes, email accounts or servers, etc.); (b) specifies a point person to oversee the preservation process and respond to questions; and (c) specifically directs that potentially discoverable documentation (to include email) evidence may not be destroyed or otherwise disposed of, and (d) suspends any implemented document destruction procedures.

Any data or document retention policy, litigation hold procedures, or other preservation strategies have little utility unless employees and senior managers are fully aware of and implement them properly. To the extent possible, companies should train senior personnel, information technology managers and designated electronic data coordinators regarding their policies and required procedures in this area, as well as performing periodic compliance audits to ensure that the companies' policies satisfy current legal standards. Please feel free to contact any attorney at Cook Brown, LLP about your document retention obligations. ❖