Perspectives: Legal Horrors Await the Unwary Among Pervasive Electronic Records

By David Pilla, senior associate editor, BestWeek

OLDWICK, N.J. September 11 (BestWire) - Reinsurance once was thought of as a business governed by gentlemen's agreements sealed with handshakes in Monte Carlo or Baden-Baden.

There was more to it than that, of course. The anatomy of a complex reinsurance deal was laid out in excruciating detail in the spring of 2004, with the first of two civil trials pitting World Trade Center leaseholder Larry Silverstein's firm against insurers and reinsurers led by Swiss Re. That trial laid bare the complex negotiations among Silverstein, the broker, insurers and reinsurers that bound property coverage of the Twin Towers.

Beyond mere handshakes, jottings on slips of paper, phone calls and e-mails all were invoked to reconstruct who promised what to whom.

Those negotiations for the World Trade Center's coverage took place a little more than five years ago, but in terms of documentary evolution and related legal implications, it may as well have been ancient Greece.

The World Trade Center trial (Part 1) demonstrated that electronic communications, however trivial and easily forgotten they seem, are vital legal evidence when disputes arise. E-mails, even cell phone records, are surprisingly difficult to destroy, are practically unalterable without leaving evidence of tampering, and are fast becoming many judges' evidence of choice.

These developments were laid out by David S. Cohen, a Washington-based partner with the law firm Milbank, Tweed, Hadley & McCoy, during a reinsurance seminar for the firm's clients in New York.

Cohen's message was simple, yet spooky: anything communicated via e-mail or cell phone - anything - can be retrieved and probably will be sought by a judge once a dispute reaches court.

E-mail is particularly dangerous, said Cohen. With the medium's rapid rise and ease of use, many people use it almost without thought, dispatching opinions and musings about both business and personal matters from the office and the home computer. But those e-mails are recoverable even if deleted, and they all will live on somewhere.

"It's the equivalent of someone following you around all the time, transcribing what you say," said Cohen.

Cohen cited some telling statistics on electronic records as potential evidence:

— 99% of all documents today are in electronic form, and most never are printed;

— About 60% to 70% of all corporate data reside in or are attached to e-mail;

— Electronic data are obtained in three-fourths of lawsuits involving Fortune 500 companies, and amendments to federal rules set to take effect Dec. 1 likely will make that trend universal.

Those rule changes on evidence and discovery will cement the importance of electronic records in future legal disputes. According to Cohen, the changes will require the discussion of electronic discovery at the outset of litigation; require responding parties to produce electronically stored information that is "reasonably accessible" and identify what is not; and provide the "reasonably accessible" information without a court order.

The new rules will allow consideration by a judge in cases of electronic information lost through employees' honest mistakes. "The rules recognize that systems crash and people make mistakes," said Cohen.

But companies must tread cautiously, since judges no longer will accept ignorance of the technology as an excuse, said Cohen.

When a company reasonably suspects it's heading for litigation, document preservation is paramount. A "litigation hold" to preserve all relevant documents is key for management.

After all, Cohen said, accounting firm Arthur Andersen's demise came not through its accounting work for defunct energy trader Enron Corp., but through legal problems stemming from its failure to preserve relevant records.

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