Keeping and Maintaining Accurate Records
by Roger McConkie

One of the most important takeaways or lessons learned from several decades of representing business clients in all fields of litigation is the constant need for the client to vigilantly maintain good records. Meticulous, accurate, and wise record keeping practices will often help companies avoid litigation. When litigation is unavoidable, such practices are critical in defending and prosecuting claims. Unfortunately, I have also learned by sad experience that the converse is also true. Poor or otherwise improper record keeping handcuffs lawyers, exposes companies to otherwise avoidable claims, and often is the difference in winning or losing at trial.

The legal term for improperly maintaining records is "spoliation." Spoliation of evidence occurs when a document or other information, whether kept electronically or by any other method, is destroyed or altered after one has reason to believe such records or information may constitute evidence in a civil or criminal proceeding. Spoliation can occur intentionally or negligently.

Where a critical document or piece of information is destroyed or lost by spoliation, the non-spoliating party may ask the court for an order requiring an inference that such damaged or destroyed information would have been useful to establish a claim or defense asserted by the non-spoliating party. Likewise, the non-spoliating party may ask the court for an order defeating a claim or defense by the party who destroyed or altered evidence. This is often referred to as a "rebuttable presumption." In extreme circumstances, where a court determines that the destruction of evidence was intentional or the result of gross negligence, cases can be dismissed and sanctions awarded. Unfortunately, by the time a law firm has been retained the damage related to spoliation may already be irreparable.

The obligation to preserve evidence is triggered at the point where a party has reason to believe or anticipate that litigation is likely and that the information or evidence is likely to be relevant to a claim or defense in the litigation. In other words, where litigation is reasonably anticipated, a client is required to preserve evidence ***before*** it brings a claim or ***before*** a claim is brought against it. In today's litigious society, and with the explosion of electronic information, it is critical that businesses carefully consider and enforce thoughtful policies

regarding the maintenance and (in appropriate circumstances) the possible deletion of electronic information. Such information may include metadata, emails, and all non-identical copies of information.

Document destruction policies should also be analyzed and vetted. Where litigation has been threatened or is unthreatened but likely, suspend all document destruction policies, whether automatic or manual. This includes all electronic data document deletion practices. Pay attention to back up and recycling practices.

Typically, when litigation begins, lawyers will send to their own clients and to opposing counsel a Notice of Litigation Hold and Preservation of Documents, Including Electronic Data. Don't wait for your lawyer to send you such a notice. Courts have found the failure to issue a litigation hold notice sufficient evidence of "gross negligence" for the purpose of spoliation. Once you first suspect that litigation is likely or even possible, contact your lawyer. Then, with your counsel's advice, notify key personnel in your company and communicate to them the need to preserve paper and electronic information. Maintain a record of all steps taken to identify, preserve, collect, and produce both paper and electronic information (yes, keep meticulous records of your record keeping!) and identify all personnel to whom the notice of litigation hold should be sent.

Typically, in the event of litigation, the type of records described above, with the exception of privileged records and documents, will be required to be disclosed or produced to the other side as part of the discovery process. In biblical terms, "what you have said in the dark will be heard in the daylight or what is whispered in your ear shall be shouted from the rooftops." In limited circumstances, records prepared in anticipation of litigation under the direction of an attorney or at the behest of your counsel may not be required to be disclosed to your opponent. Thus, it is prudent to discuss with your counsel long before litigation is even anticipated document retention and destruction policies and practices as well as internal investigation and reporting practices.