



## Elements of a Good Document Retention Policy

Document retention—especially the retention of electronic data—has become a hot topic in the legal industry. In the wake of several court decisions leading to high-dollar jury verdicts, law firms that want to stay competitive need to start thinking about how to advise their clients about the retention and preservation of information.

In the twenty-first century business world, companies are creating and storing electronic documents and information at light speed. Consider the facts: over 99% of all documents created and stored are created and stored electronically and somewhere around 60 billion emails are being created and sent *each day* according to the IDC. Electronic information is not just found on desktops and laptops, either; it is captured by instant messaging programs, housed on BlackBerry® devices, Web sites, data recorders, and the list of storage mediums continues to grow. Because electronic documents and information are easier to store, more information is being retained and archived on backup tapes and servers. But for modern businesses, all of this electronic information can be expensive to store not only because of the cost of the physical storage of tapes, but because of the potential liability of keeping sometimes seemingly useless information too long—or not long enough. So how does a company balance the need to keep information for business purposes with what is required in our litigious society?

### What is the law?

First, outside of regulations governing certain industries (e.g., Rule 17a-4 of the Securities and Exchange Act which requires SEC-regulated companies to retain emails for at least three years, the first two in an easily accessible place) there is no universal law of document retention. The only common law duty to preserve documents and information is when a company is on notice of pending litigation. At this point, a “litigation hold” must be implemented to retain documents the company reasonably believes are discoverable in anticipated litigation.<sup>1</sup> Thus, document retention requirements vary from industry to industry and from case to case. However, what is becoming clear, through recent spoliation case law such as *Zubulake v. UBS Warburg (Zubulake V)*, 2004 U.S. Dist. LEXIS 13574 (July 20, 2004) is that not having a document retention policy or a plan for implementing a litigation hold can have devastating consequences. But where does a company start?

### A Formal Policy is a Must

First and foremost, companies should have a document retention policy which must be actively enforced and audited. Although the case law may appear to mandate keeping everything for an indefinite period of time, recent decisions have indicated that even companies in continuous litigation are not required to keep every “shred of paper, every email or electronic document and every backup tape ... Such a requirement would cripple large corporations.” *Zubulake IV* at 217. Thus, outside of industry regulations and any litigation hold requirement, a company need only keep electronic information as long as necessary for business purposes—but no longer than that.

This is important for several reasons. First, adhering to a policy may limit liability in the long run. Many a case has been damaged due to the surfacing of unfavorable emails or documents kept too long and taken out of context. In many of those cases, had document retention policies been in place and enforced, that information would no longer be available.

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<sup>1</sup> See *Zubulake v. UBS Warburg LLC, (Zubulake IV)*, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y., Oct. 22, 2003).

Second, if a document retention policy limits how long information is kept, companies will have less information to search and review if served with a document request. For example, if a company's policy is to hold on to documents for two years, then once a litigation hold is in place, there should only be two years of stored information that must be searched in order to find relevant documents. This can save a company time and money in the long run, as the most expensive part of any discovery phase is the attorney time spent reviewing documents.

Finally, under the Federal Rules of Civil Procedure (FRCP) only electronic information that is "reasonably accessible due to undue burden or cost" is discoverable. Thus, a good document retention policy will put a company in control of what is available and discoverable under the Federal Rules.

### Policy as a Litigation Preparedness Tool

A good document retention policy can also be used as a litigation preparedness tool and will give in-house and outside counsel a roadmap to finding documents in the event of a document request. In order to create a workable policy, companies must know where all of their documents and information are kept and how that information is stored. *Coleman (Parent) Holdings* can be seen as a cautionary tale of a corporation (Morgan Stanley) that did not know where it stored and kept all of its electronic data. After the company was found guilty of discovery abuses stemming primarily from its lack of knowledge about the location of its discoverable information, a jury awarded the plaintiff \$1.4 billion in compensatory and punitive damages. A comprehensive document retention policy would have directed the company to its relevant documents.

Any policy should also state the names of the custodian(s) of the information and should list the types of servers and backup tapes that are used. Creating a policy will also require counsel to become familiar with their client's IT systems, which will be necessary if a court ever requires an explanation. The Federal Rules require that attorneys have a working knowledge of their clients' IT systems. Pairing with a client's IT department early can also prevent problems later on. Many corporate IT departments are not equipped to handle the volume of document retrieval that is often involved in litigation or government inquiries. Knowledge of the capabilities of an IT department will allow a corporation to hire outside vendors who can help archive data so that it is searchable later if needed.

### Implementation and Flexibility

A document retention policy is only as good as its implementation. A policy needs to be rigorously enforced from top management down. Companies must make sure they educate their employees about not only the policy, but the implications of not following it. It must be easy to follow, periodically renewed, and it must clearly lay out how often it will be audited. The policy should also address the fact that employees may store and save information in different ways (i.e., some employees may save documents to a hard drive, others to a network) and on different hardware (some emails are only saved on BlackBerry® devices and not in desktop or laptop inboxes). In addition, the policy must be flexible enough to be suspended if a litigation hold is necessary. The policy should address the litigation hold and how it is to be implemented, including any policy on email backup tapes.

Following the rulings in *Zubulake*, email backup tapes created for disaster recovery only are not subject to a litigation hold unless they are accessible. The *Zubulake* case did not define "accessibility" but under FRCP 26(b)(2)(B), a party need not provide discovery of electronic information from sources that the party identifies as not reasonably accessible because of "undue burden or cost." On the other hand, according to the court in *Zubulake IV*, if a company can locate the information of the "key players" (employees likely to have

relevant information to the litigation), that information should be preserved even if it exists in the form of disaster recovery backup tapes. Thus, a document retention policy should specifically address how email backup tapes are handled.

In the wake of *Zubulake*, one could argue that backup tapes should always be used for disaster recovery only and not as an archival system. In fact, backup tapes are not adequate for storage and search of large volumes of email information. The policy should also attempt to identify who the key players in the business may be and where their information is stored.

### **Preventing Sanctions**

In the end, when it comes down to litigation or a government information request, the most important reason for a company to have a workable and active document retention policy is that it can persuade a court that documents that no longer exist were purged pursuant to a policy and not willfully destroyed and spoliated. Courts do not have a lot of patience for companies that mismanage or delete documents on an inconsistent basis. See, e.g., *Wachtel v. Health Net, Inc.*, 2006 U.S. Dist. LEXIS 88563 (D. N.J. Dec. 6, 2006)(not for publication) and *Krumwiede v. Brighton Associates, LLC*, 2006 U.S. Dist. LEXIS 31669 (N.D. Ill. May 6, 2006). The Federal Rules even contain a “safe harbor” for companies who fail to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. If a company’s policy is comprehensive and routinely audited, it can provide the court with assurance that a company has all of the information it is required to keep, and knows how to find it which can go a long way to protecting a corporation in the long run.

We haven’t heard the last word on this issue. As technology continues to change, so will the law. Lawyers who want to stay competitive will make sure they keep up-to-date on both.

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