

E-mail Retention Policies: Perspectives on Retention and Spoliation

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What policies and procedures should a corporation put into place in light of its retention duties?

- Corporations should take a prophylactic approach to satisfying the duty to retain documents relevant to litigation.
 - 1) Develop and distribute written procedures as to how the corporation and its employees should respond to the onset of litigation.
 - For example:
 - Who reviews the demand letter? (HR, management, etc.)
 - The person who reviews the demand letter then should notify the persons involved with document retention (HR, IT, managers, etc.) that the duty to preserve certain documents has been triggered.
 - Standardize procedures for instituting a “litigation hold,” meaning the suspension of a company’s document destruction processes in order to ensure retention of documents relevant to the litigation.
 - Designate who will identify the “key players” in the matter which is the subject of the potential litigation discussed in the demand letter. (e.g. managers, co-workers, tortious actors, etc.).
 - The person who identifies the “key players” is a matter of discretion. In-house counsel, HR, or a manager are three possibilities. It should be somebody who understands the scope of the duty to preserve and understands or can be briefed about the facts of the matter which has become the subject of litigation.
 - In Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004), Judge Shira Scheindlin introduced the “key players” standard to describe the type of employees who are custodians of documents to whom the duty to preserve documents extends.
 - Realize that for any “key players” who are parties to the lawsuit or negatively implicated by it may have an incentive to violate the litigation hold on the destruction of documents.
 - It may be prudent to bring in a third party observer to ensure that such key players directly implicated by the litigation properly comply with the duty to preserve documents.

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- Trigger a halt to any automated document destruction processes within a reasonable time (i.e. notify IT about the matter and which documents need to be retained).
 - Standardize the procedures for triggering such a halt to document destruction:
 - How will notification to IT occur? (written notice, email)?
 - Who will be notified? (Head of the IT department, a specific IT employee, etc.)
 - What is expected of IT in the process of instituting the litigation hold?
 - How does IT destroy documents?
 - How does IT halt the destruction process?
 - Which documents are being destroyed?
 - Are there different document destruction methods?
 - Are their different methods for halting document destruction?

2) Store documents in an organized way

- Retrieval of documents is much easier when you know where the documents you need to locate are specifically!
- For a corporation with a lot of documents, it likely is preferable to continue destruction of some documents while terminating the destruction of those relevant documents which must be retained pursuant to the litigation.
 - BUT, the corporation also wants to cast a wide net for documents to preserve so as not to risk spoliation.
 - Competing standards: relevance of the documents vs. risk aversion in not wanting to destroy relevant documents, creating exposure to spoliation.
- Storage of documents costs money- save only what you need to save!
- Even though storage of documents costs money, searching for the documents you need to retrieve when you don't know where it is stored can be even more expensive.
 - Many corporations still use backup tapes—it is a cheap form of storage—but not a cheap form of retrieval.
 - So a warehouse full of uncatalogued backup tapes can be a house of horrors financially when you need to find certain documents stored somewhere in there!

3) Develop methods for the identification and retrieval of relevant documents.

- Zubulake, at 432- Judge Scheindlin states that counsel has a duty to locate relevant information
 - Keyword searches.
 - Judge Scheindlin proposes a method:
 - a. Compile a broad list of keywords that might be relevant to litigation.

- b. Preserve all documents that are “hits” from this keyword search (counsel need not necessarily review each of these documents, as there may be a very large number of them and such review is not yet necessary).
 - c. Negotiate with opposing counsel a narrower list of keywords for a search to identify documents to be produced.
 - d. Review the documents from this narrower search and withhold from production any documents not appropriate for disclosure in discovery (e.g. privileged documents).
 - Indexing stored documents.
 - Documents stored in a jumbled mess so that you can never find them are as good as those which are lost or destroyed!
 - How to save and export information and documents from proprietary software and other databases? (This might require significant input from the IT department—it is better to put this work in beforehand than to be under the gun with a threat of spoliation if relevant documents are accidentally destroyed).
- 4) Don't forget about metadata!
 - Metadata is the information “behind the scenes” that can provide valuable insight into the document itself.
 - For example, has the email been read or not? Does your email server make new emails bold and then unbold the email once you have clicked on it? That isn't magic—it is the result of a program measuring the metadata (did you click on the email; when?) and reacting accordingly.
 - Corporations should consult with IT about preserving and accessing stored metadata
 - Other important questions involving metadata:
 - What time was the email sent? Received? Opened?
 - Was there an attachment?
 - Was the email flagged or otherwise accentuated in some way by the recipient or another party?
 - How was the email stored?
 - Were there drafts of the email? What differences were there between the different draft emails?
 - Did anybody attempt to delete or tamper with the document?
 - Keep in mind that if issues such as the integrity of an email come into question, the metadata may well be relevant to the litigation.
 - Destruction of metadata (i.e. printing out all emails, saving them in pdf form, and destroying the native form emails, thereby losing the metadata being stored by the email server), may prejudice the opposing party due to the loss of that potentially valuable evidence.