

Vedder Price
To Shred, or Not to Shred: Responsible Practices for Records Management and eDiscovery
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*Certified Equity Professional Institute
Third Annual Symposium
Santa Clara University
September 13, 2006*

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Today's Agenda

- I Why Have a Records Management Program?
- I Building a Legally Defensible Records Management Program
- I E-mail and Compliant E-mail Policies
- I Protecting Confidential Personal Information and Data

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Why Develop A Records Management Program

- I Once the retention "clock" has started, records are not corporate assets
 - They are assets for your adversaries
- I Retention requirements vary depending on the type of record, how long the record might reasonably be needed and how long the record must be maintained

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The Problem Is Here to Stay

- I 75% – 95% of the documents in your organization are of little value to your organization and are potential liabilities
- I 45% of your stored files are duplicates
- I 85% – 90% of all records are never referred to after the initial transaction
- I Close to 50% of the space in technology is used to maintain recorded information and is being used to maintain duplicate records

A Case Study

In the late 1980s, a large oil company purchased a Pennsylvania-based corporation for its assets and customer base. The operation was shut down soon after. In litigation 11 years later, records that would have belonged to the old company were requested, and the legal group was surprised to find that over 10,000 boxes still existed at a record warehousing company facility. Faced with the discovery demand, the corporation spent over \$2 million combing through 10,000 boxes of old records, finding only six boxes that contained any records that had any relationship to the matter at hand. Did the records provide the "smoking gun" their adversaries hoped for? No. The records neither helped nor hurt the company. They simply wasted over \$2 million searching for records that should have been long since disposed of under their already-existing corporate policy. The head of litigation was quoted as saying, "We do this all the time and act like it's just a cost of doing business."

Strategy for Developing a Records Retention Program - Understand the Goal

- I Protect the legal and financial interest of the corporation
 - Address legal questions first
 - Technical, operational and administrative issues addressed only after the legal questions have been answered

Building a Legally Defensible Records Management Program-Objectives

- I Enhance productivity and competitive advantage by maintaining current information;
- I Manage the overhead costs associated with storage and maintenance of records that have no enduring business or legal value;
- I Comply with applicable federal and state laws/regulations;

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Building a Legally Defensible Records Management Program-Objectives (cont.)

- I Ensure uniformity in management of records throughout the company; and
- I Ensure protection, retention, storage and disposition of company records in accordance with the Records Retention Schedule

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Elements of a Compliant Records Management Program

- | | |
|---|-------------------------------------|
| I Records Management and Retention Policy | I Records Collection Notice |
| I Records Retention Schedule | I Vital Records Policy and Schedule |
| I Disposal Suspension Policy | I Electronic Communications Policy |
| I Disposal Suspension Notice | I Training |
| | I Compliance Auditing |

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Issues and Risks

- I Lack of leadership driving the project
- I Retention schedules poorly developed - too general or too detailed
 - Examples
- I Inadequate implementation strategy
- I Inadequate coverage for electronic records

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Issues and Risks (cont.)

- I Vulnerability to damage or loss
 - Vital records
- I Inadequate controls: creation and maintenance
- I Redundancy of information: electronic and non-electronic - poor taxonomies

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Issues and Risks (cont.)

- I Records management solution that will provide critical support and long-term viability
- I Legal implications ignored

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Discretion Perpetuates Serious

Employee Discretion  <ul style="list-style-type: none">Invalid record namingMultiple records platformsRecords are selectively retained	Wasted Time and Money  <ul style="list-style-type: none">Research is complicatedUnnecessary storage costsUnnecessary research costs	Increased Legal Risk  <ul style="list-style-type: none">Unnecessary settlements and finesObstruction of justice chargesSenior executives personally liable
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Enforcement Reduces Costs and Legal Risk

Enforced Records Retention  <ul style="list-style-type: none">Standard record names enforcedRetention standards systematically enhancedRecords types identified in records platforms	Operational Efficiency and Reduced Costs  <ul style="list-style-type: none">Records can be produced efficientlyObsolete records and costs are eliminatedUnnecessary research costs reduced	Reduced Legal Risks  <ul style="list-style-type: none">Obsolete records are not availableRecords are eliminated systematically"Hold" management protects needed records
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Building the Program

- I Records Retention Schedule
- I Methodology Memorandum
- I Opinion Letter
- I Spreadsheets
- I Does it feel like an "A"?

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Implementing and Complying with Litigation Holds

- I *Zubulake v. UBS Warburg LLC*, a party must take affirmative steps to preserve documents, including:
 - Issuing a litigation hold at the outset of the litigation or when litigation is reasonably anticipated;
 - Communicating the litigation hold directly to all key employees;
 - Reiterating the litigation hold instructions regularly; and
 - Monitoring compliance with the litigation hold

Concerns Over Destroying Documents Prematurely

- I Improper destruction of documents may lead to:
 - Grounds for sanctions
 - Adverse inference instruction
 - *Mosaid Technologies, Inc. v. Samsung Electronics Co., Ltd.*--issued adverse inference instruction relative to destroyed e-mails

Concerns Over Destroying Documents Prematurely (cont.)

- Spoliation of evidence
 - *Broccoli, et al. v. Echo Star Communications Corp., et al.*
 - "Risky" and "extraordinary" policy providing for automatic deletion of e-mail after 21 days
 - Sanctioned for "indefensible" failure to suspend automatic deletion
- Preservation letters

E-mail and Compliant E-mail Policies

- I E-mails Are Discoverable
- I The changes to the Federal Rules recognize the pivotal role that e-mail communication plays in discovery
- I Safe Harbor provision – no sanctions where electronically stored information disposed in “routine operation of the party’s electronic information system”

The Important of E-Mails in Litigation

- I More than one in five (21%) companies had employees’ e-mails and instant messages subpoenaed in government investigation or produced in civil lawsuits
- I 49% of attorneys cite e-mail as the No. 1 type of information requested in cases involving eDiscovery
- I Discovery alone costs an estimated 50 cents to two dollars per e-mail

Source: PricewaterhouseCoopers/Section of Litigation of the American Bar Association Pulse Survey – May 2000

The Important of E-Mails in Litigation (cont.)

- I “The possibility of increased CV [cardiovascular] events is of great concern.”
 - E-mail from top Merck scientist, two years before company began selling Vioxx
 - Jury verdict of \$253 million, including \$229 million in punitive damages, Wall Street Journal, August 12, 2005, page 1
 - Three more verdicts and large punitive damages awards since August 12, 2005

The Important of E-Mails in Litigation (cont.)

- I Coleman v. Morgan Stanley
 - Adverse inference led to a \$1.45 billion judgment against Morgan Stanley
- I Marsh & McLennan
 - E-mail soliciting a fake bid from insurance company to help Marsh steer business to a favored provider



The Downside of the “Hold Everything” Approach

- I Not mitigating litigation and retention risks.
- I Increasing risk of liability “smoking gun” e-mail was unnecessarily retained.
- I IT/IS department will likely struggle with implementation.

Electronic Communications Policy: The Content-Based Approach

- I Content, not media, driven
- I Meets legal requirements and best practices
 - NARA's Disposition of Electronic Mail Records with Short Retention Periods
 - Distinguishes between Record E-mails and Non-Record E-mails

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Electronic Communications Policy, cont'd.

- I Describe permitted and prohibited uses
 - Primarily for business purposes
 - Offensive e-mails prohibited

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E-mail Retention

- I Record E-mails retained in accordance with company's overall record retention schedules
- I Non-Record E-mails retained for only a short period (i.e., 21-30 days)
 - Majority of e-mails are Non-Record E-mails
- I Minimize litigation risk and reduce storage costs
 - The funnel

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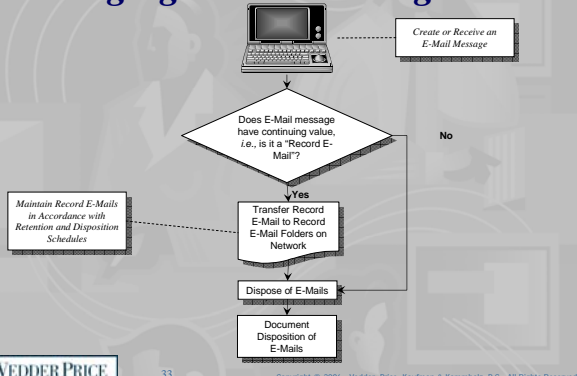
Record E-mails Defined

- I A Record E-mail:
 - Documents a specific business-related event or activity;
 - Demonstrates a specific business transaction;
 - Identifies individuals who participated in a business activity; and
 - Supports facts of a particular business-related event, activity or transaction; or
 - Is needed for other specific legal, accounting, business or compliance reasons.

Non-Record E-mails Defined

- I Non-Record E-mails:
 - Routine administrative messages
 - General communications
 - Information-only copies of memoranda or attachments
 - Notes of a transient nature having short-term value, such as meeting notices

Managing E-mail Messages



Protecting Confidential Personal Information (Federal Law)

- I Gramm-Leach-Bliley Act/Regulation S-P
- I HIPAA
- I Fair Credit Reporting Act §605A
- I FACTA
- I Proposed Personal Data Privacy and Security Act
- I ECPA

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Protecting Confidential Personal Information (State Laws)

- I New York's Information Security Breach and Notification Act
- I New Jersey's Identity Theft Prevention Act
- I California's Security Breach Information Act
 - Example--ChoicePoint
- I 22 states have enacted similar legislation

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Lessons Learned

- I When business possesses confidential personal information and sustains a security incident, it must determine:
 - Whether the incident triggers a notice report under any federal or state security breach statute;
 - If so, what notice(s) must be sent, to whom, and within what time frame; and
 - Should the business notify all persons whose data may have been affected, regardless of whether or not there is any statutory obligation that may require such notice.

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FTC Cases on Privacy Policies

- I *Petco*
- I *Vison / Properties*
- I Representations made about privacy and security of confidential consumer information obtained thru website
- I Failure to provide appropriate security measures to protect confidential consumer information constituted unfair and deceptive trade practices

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Lessons Learned

- I Avoid making unqualified promises about company's privacy policies and stringency of safeguards to protect consumer's personal information
- I Ensure any representations are consistent with existing privacy policies and security measures
- I Deploy appropriate security measures to safeguard privacy of confidential personal information gathered from customers or visitors to website
- I Conduct annual privacy compliance and information security audits to ensure that actual practices remain consistent with privacy policies and public representations

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