

THE NEW IMPORTANCE OF RECORDS RETENTION AND LEGAL COMPLIANCE

By Chanley T. Howell

In light of the vast volume of electronic, computer files and communications, and the Federal Rules of Civil Procedure pertaining to e-discovery, companies now realize the need for a comprehensive records retention policy. Current business standards dictate it is not only a best practice to have a policy, but it is also a part of meeting minimum standards of legal compliance and prudent business operations. Commentators and courts have routinely indicated that every company should develop its own written policies given the substantial risks of not having an effective policy, as well as the numerous benefits from a policy. Records retention is particularly important for companies in the construction industry, as construction litigation is particularly known for its high volume of paper and electronic records, and the substantial costs associated with complying with discovery obligations during litigation or investigations.

Keeping everything is not the answer.

Companies that say they keep everything don't. Employees will always discard paper records, electronic files and e-mails. Additionally, keeping everything will result in substantially increasing the volume of records that have to be located, reviewed and analyzed in the event of litigation or an investigation involving the company. Accordingly, it is imperative for organizations to adopt a policy governing destruction in order to avoid liability for selective destruction of records or spoliation.

Risks of Noncompliance.

Failure to retain records in compliance with applicable law and in connection with pending or threatened claims can result in regulatory and court sanctions, fines, unnecessary expense and other adverse consequences. Inadequate and ineffective records storage and retention practices can result in (a) the loss of valuable trade secrets, confidential information and other important business and proprietary information, and (b) the breach of privacy laws and regulations. The cost (time, money and resources) of complying with litigation discovery requests can be significantly reduced through implementation of cost-effective records retention and e-discovery policies and practices.

Benefits of Proactive Records Management.

The benefits of an effective records management program include easier and timely access to necessary records; complying with statutory and regulatory retention obligations; reducing storage costs; protection of confidential and proprietary information; and meeting e-discovery obligations. An effective records retention policy can mitigate the risks of not actively managing electronically stored information (ESI), such as, the inability to efficiently locate and use important business information; sanctions due to the failure to comply with statutory and regulatory retention and destruction laws; increased costs due to inefficiencies from inaccessible information; and the inability to comply with e-discovery require-

ments, court orders and other litigation-related requirements. Companies that invested the time and resources to prepare a comprehensive records retention policy have learned that they can comply with their discovery obligations efficiently. In contrast, companies that have not prepared in advance have found themselves unable to make required disclosures and to timely comply with discovery obligations without incurring tremendous costs. Most significantly, these companies who have not prepared for e-discovery have suffered evidentiary and monetary sanctions.

Developing a Retention Policy.

In developing a records retention policy, the company should first analyze the records environment to assess areas and levels of risk to the organization that may result from existing records retention policies and practices. Based on identified risk areas, the company can then evaluate existing written and/or de facto policies, processes, and technologies to identify weaknesses, categorize risks, and recommend improvements. With the results of the risk and needs assessment in hand, the organization can then modify the existing policy or develop a new, practical, and cost-effective records management and retention policy that addresses and resolves any potential issues revealed during the risk and needs assessments.

Electronic Discovery Obligations.

To avoid court sanctions, costly e-discovery compliance, and missing court deadlines, companies should prepare in advance to properly respond to e-discovery requests and mandatory disclosures. The company should provide training to its personnel with respect to the policy to assist compliance with paper and e-discovery obligations. A critical aspect of litigation preparedness is knowing what electronic records the company maintains and where they are stored. The company should develop legally compliant data maps that categorizes the company's electronic records, identifies where the records are stored as well as the appropriate records custodians who can provide electronic records as needed.

The Records Retention Policy should address obligations under the Federal Rules of Civil Procedures relating to electronically stored information. The Federal Rules of Civil Procedure were amended effective December 2006, adding numerous rules and regulations relating to electronic records, or as referred to in the Rules, ESI. Among other things, the Rules require early treatment of e-discovery issues, as well as full and accurate disclosure of the existence of relevant ESI. If not properly planned, managed and coordinated, locating and producing ESI can become very time-consuming and expensive. Failure to comply with the discovery rules can result in court imposed sanctions, fines and adverse rulings. Accordingly, it is critical for companies to develop accurate documentation describing its ESI practices and policies on the "front end," rather than dealing with these issues on an ad hoc, case-by-case basis after litigation has commenced.

Developing the Retention Schedule.

An essential component of every records retention policy is the Retention Schedule that identifies all different types and categories of records, and the required retention periods. The retention periods may be based on a statute, regulation or other law that mandates the record be retained for at least a specified period of time, or in the absence thereof, operational requirements dictating that records should be available for at least a certain length of time. Failure to utilize an accurate Retention Schedule can lead to premature destruction of records, resulting in legal fines and sanctions, and loss of

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information needed for the ongoing operations of the business. The company's records retention policy should have a Retention Schedule that accurately and concisely identifies all different categories and types of paper and electronic records retained by the company, and legally compliant retention periods for each category or type of record.

The E-mail Problem.

E-mail proliferation is a problem faced by every company. Confronted with growing storage costs and system performance issues, companies are limiting the amount of e-mail that employees can keep. Tape backups typically do not keep a complete record of all e-mails. While limiting e-mail volume is legally appropriate, and in many cases advisable, the company must also ensure employees (or an automated system) do not delete e-mails that are required for on-going business operations or legal compliance. Companies should implement policies and practices for ensuring required e-mails are not prematurely destroyed, for example, by migrating or archiving required e-mail records to a document management system, or secure networked data servers.

Improper destruction of records, or spoliation, can result in fines, sanctions, adverse legal rulings and other undesirable consequences. Even inadvertent destruction of records can lead to adverse results, particularly where the company's records retention policy does not adequately deal with "litigation holds." The obligation to preserve records can arise before a lawsuit is initiated or a demand letter received. The records retention policy should properly address the retention of relevant records, including timely notice to employees, compilation and production of records, and suspension of normal records destruction with respect to relevant records.

The Importance of Centralized Storage.

Electronic records can be stored in a variety of locations – network servers, local hard drives, home computers, laptops, handheld devices, CD-ROMs, flash storage devices, web-based e-mail applications, online backup sites, etc. Multiple locations add to the difficulty and cost of locating and producing records, and increase the likelihood that records will be lost, not produced when they should be, and/or improperly disclosed to third parties not entitled to access the records. When a company is required to locate and produce electronic records in litigation (as a party or a third-party witness), it must search all locations for potentially relevant records, and produce those records. Companies should require storage of records in locations and in manners that facilitate prompt and cost-effective location and production, and consider limiting the locations where electronic records may be stored by employees.

Dealing with Independent Contractors & Vendors.

Many companies use independent contractors and outsource functions and operations of the business, resulting in third parties having primary responsibility for storing, retaining and disposing of company records. Outsourced functions include areas such as information technology, accounting, human resources or other business processes. In such instances, the company should require the outsourcer to comply with the company's records management policies through appropriate

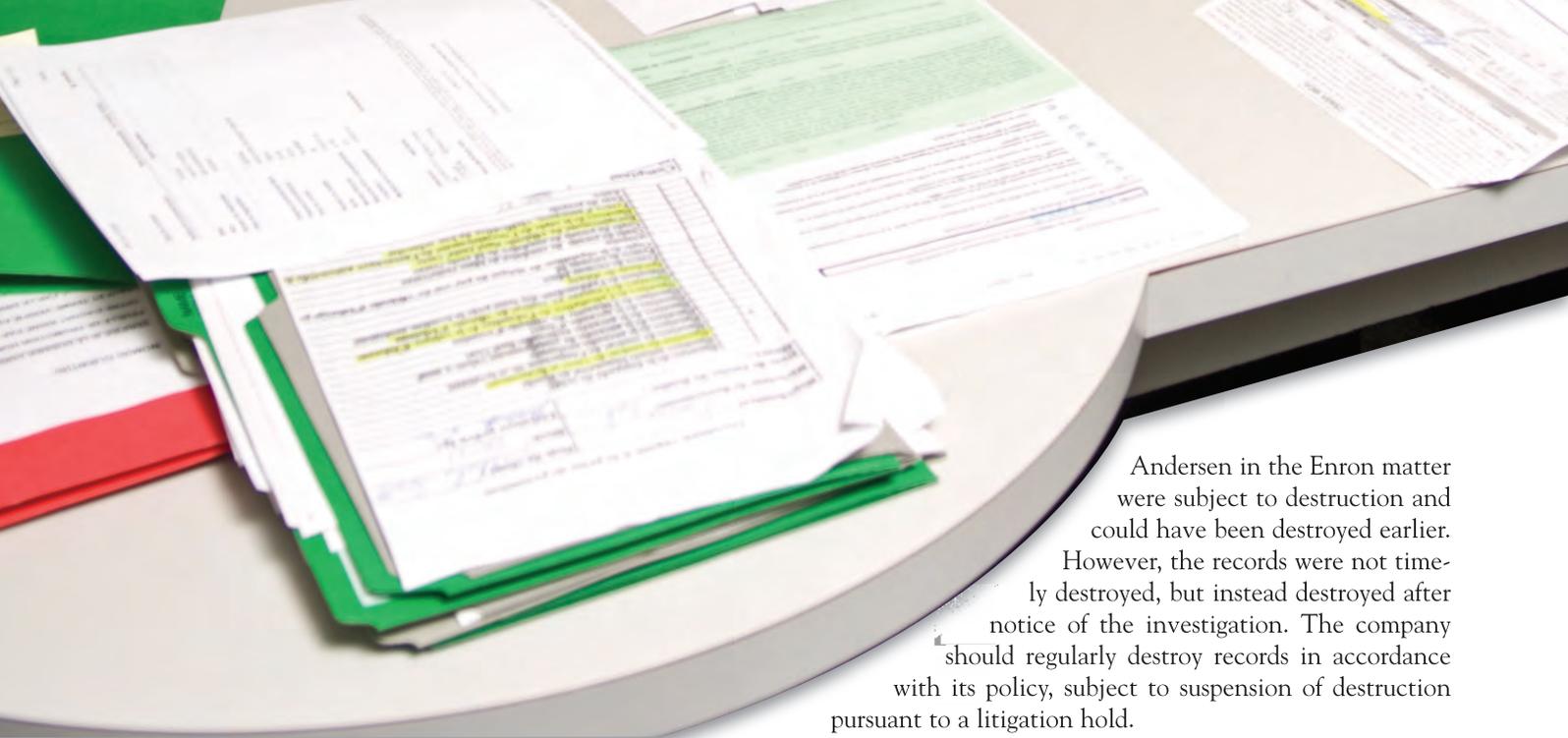
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Andersen in the Enron matter were subject to destruction and could have been destroyed earlier. However, the records were not timely destroyed, but instead destroyed after notice of the investigation. The company should regularly destroy records in accordance with its policy, subject to suspension of destruction pursuant to a litigation hold.

contract language, monitoring, reporting by the outsourcer and periodic auditing of the outsourcer.

Destruction.

The flip side of retention is destruction. In order to obtain the benefits of having a policy and avoiding liability for improper destruction of records, it is necessary to destroy records in accordance with the policy. The records destroyed by Arthur

Conclusion.

Records retention is a critical part of any business' legal compliance activities. Failure to adopt and enforce an effective records retention policy can result in court ordered fines and sanctions, as well as increased cost of complying with subpoenas and other discovery obligations in litigation and investigations. An effective program can also result in substantial cost savings for the company, as well as more efficient retrieval of records needed for day-to-day business operations. Accordingly, a well thought out and drafted records retention policy is an important piece of business strategy and legal compliance for all organizations. ▼

Mr. Howell is a partner with the Jacksonville office of Foley & Lardner, and a member of the firm's Information Technology & Outsourcing Practice group.

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