Electronic Document Lifecycle Management: *Finish the Job!*

By Anne Kershaw

Organizations are drowning in a rising tide of unnecessarily retained electronic data,[1] caused by the ease with which users can accumulate and hoard data, and a fear that sanctions might be imposed if the organizations clean house. The consequences? Inflated data storage and management costs, plus greatly inflated legal review fees in the event of litigation. All without any clear understanding as to what records and information are being retained or why.

Clearly, for electronic data subject to preservation due to a legal hold or preservation requirement, it is better to know what you have and why you have it. Representing to a judge that you have saved everything but don't know what you have (absent spending millions of dollars) just doesn't feel like a winning argument. Yet the lawyers likely to be tasked with making this argument are often most resistant to advising clients to delete/destroy records and information in accordance with the governing records management policies. It seems that from their perspective saving everything is the only insurance policy available.

To advise an organization to permit the destruction of unnecessarily retained data, or to at least resolve their objections, we need to give them a new insurance policy – a reasonable process and rationale that can be explained and defended. This article suggests an approach for creating and implementing such a process, demonstrating for counsel that saving everything is not the insurance policy they think it is. Managing and disposing of data when eligible, on the other hand, is the best method for ensuring that the right information is preserved and that you know what you have preserved and why, so you can defend it.

The cases show that sanctions are imposed where there had been 1) no or extremely poor preservation of information after being put on notice of the likelihood of litigation; 2) inadequate search and production of evidence; or 3) outright deception on the court.[2] There are no cases in which a company has been sanctioned for the good faith operation of a document retention policy absent a preservation or legal hold requirement. Indeed, in its opinion in the Arthur Anderson[3]/Enron matter, the United States Supreme Court noted that it is expected and appropriate for companies to follow document management policies, which policies would naturally include the disposition of data that they are no longer obligated to retain.

There are cases where companies have been sanctioned for using the *ruse* of implementing a document retention plan to destroy relevant information after learning about the likelihood of litigation, but those fall far outside the good faith operation of a document retention plan. In Rambus, Inc. v. Infineon Technologies AG, 155 F.Supp.2d 669 (ED VA 2001), a document retention policy was implemented, in part, "for the purpose of getting rid of documents that might be harmful in litigation," p. 682, rev'd in part and vacated in part, 318 F.3d 1081 (Fed. Cir. 2003).

The point is that, in fact, there is no legal requirement to keep all electronic data ever generated by an organization. The Sedona Conference is a very influential organization in the area of electronic discovery with participation by leading academics, practitioners and jurists; its publications on various aspects of electronic discovery have been cited in over 70 federal court opinions. Its retention guidelines[4] state that:

> 3. An organization *need not retain all electronic information ever generated* or received.
>
> a. *Destruction is an acceptable stage in the information life cycle*; an organization may destroy or delete electronic information when there is no continuing value or need to retain it.
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> b. *Systematic deletion of electronic information is not synonymous with evidence spoliation*.
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> c. Absent a legal requirement to the contrary, *organizations may adopt programs that routinely delete certain recorded communications*, such as

[1] "Electronic data" or "electronically stored information (ESI)" includes email, text messages, instant messages, voice mail, electronic documents and information in databases.

[2]. See Dan H. Willoughby, Jr, Rose Hunter Jones, and Gregory R. Antine, "Sanctions for E-Discovery Violations by the Numbers," *Duke L.J.* 60:789 (2010).

[3] Arthur Anderson LLP v. US, 544 US 696, 704 (2005). Google Scholar Link: http://scholar.google.com/scholar_case?case=9749195094830574590

[4] Lori Ann Wagner, Editor in Chief, *THE SEDONA GUIDELINES: Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age, Second Edition* (2007), ("Guidelines").

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electronic mail, instant messaging, text messaging and voice-mail.

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(Emphasis added.)

The International Standards Organization publishes *ISO 15489-1, Information and documentation -- records management*. It states in section 9.2 that,

> "Records retention should be managed to meet current and future business needs by…
>
> 3) eliminating, as early as possible and in an authorized, systematic manner, records which are no longer required."

Similarly, as noted above, the U.S. Supreme Court has observed in the Arthur Anderson/Enron case that:

> "Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. … *It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances*." [5] (Emphasis added.)

The problem in the Arthur Anderson case was that Enron was on notice of potential litigation when it undertook its shredding program.

The right of an organization to destroy unnecessary retained records and information is based on the common-sense need for an organization to keep its data reasonably current and manageable. For example, each user generates about a gigabyte of data a year on file shares. With hundreds or thousands of employees, many of whom have since left, it can become virtually impossible to find or manage the data collection if the old, unneeded data is not removed. Even when the collection is searchable, without the removal of unneeded data, users have to continually weed through it to find current relevant information.

If that unnecessarily retained information is captured as part of the discovery process in litigation, the costs to review it can be staggering.[6] For example, 250 GBs equate to about 7.5 million pages after removing duplicates. At 250 pages per hour it would take 37,500 hours of attorney time to review those records and even at a relatively low per hour fee of $75 per hour that would cost $2.8 million.

Document review costs are invariably proportional to volume and while there are technologies and processes that can greatly reduce the volume and time spent on review,[7] it nonetheless continues to be the most expensive part of the discovery process. Having unneeded data float into the process simply because it is there only inflates already significant review costs.

Two intertwined trends also argue in favor of jettisoning unnecessarily retained records and information: the ever-increasing globalization of business and the increasing protection of personally identifiable information or (in the European Union) personal data. Indiscriminate hoarding of information can, over time, lead to the inadvertent violation of the laws of various jurisdictions by the unintended or unauthorized disclosure of that data or the lack of adequate security with which it is stored, compounded by a failure to follow the required notification procedure for reporting violations.

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[5] Arthur Anderson LLP v. US, 544 US 696, 704 (2005). Google Scholar Link: http://scholar.google.com/scholar_case?case=9749195094830574590

[6] The cost of reviewing electronic records for responsiveness and privilege prior to production can be a major component of the litigation budget ranging from 5 to 50% for different companies. See Fulbright's 4th Annual Litigation Trends Survey.

[7] See A. Kershaw and Joe Howie, "Judges' Guide to Cost-Effective E-Discovery," published by the eDiscovery Institute, a 501(c)(3) nonprofit research organization. Available for free download at www.akershaw.com/articles/JUDGES%20GUIDE-fnl_PDF3v2.pdf

Managing and disposing of data that does not need to be retained is ***per se*** reasonable.[8] The following steps document and verify this and provide the foundation for an expert Opinion Letter, discussed further below, that recommends the disposition of data that does not need to be retained:

1. *Confirm the existence and implementation of document or data retention polices*

   Retention policies that are enforced and consistently followed are the foundation upon which the defensibility of the whole program rests, so a fresh look at the retention policies is in order. Confirm in particular that the document retention policies provide that records should not be retained past their retention period and information is not being kept longer than needed for business purposes.

2. *Confirm that reasonable and appropriate steps have been taken to preserve documents and data for pending and expected legal matters*

   Understanding the status of discovery and confirming compliance with legal obligations is key, since legal holds trump normal retention policies and can impose preservation requirements on data that would not otherwise be preserved under the retention policy. Lawyers requiring the wholesale preservation of large data sources "just in case," without an understanding of what relevant information is in the data source, should be required to retain such data as part of the case file and case expenses. **In other words, anything and everything preserved for legal matters must be identified and attached in some way to the matter for which it is being preserved.**

3. *Confirm compliance with records management policies and legal holds*

   Identify persons, divisions, or departments that are most involved in legal matters and verify through an interview process that they are in compliance with the records retention schedule and any relevant legal holds.

4. *Inventory legacy and portable media and conduct interviews to obtain anecdotal information regarding the media*

   Few things are more embarrassing and potentially more damaging in litigation than to have made representations to the court that certain data does not exist only to find out during a deposition or at trial that the witnesses knew of tapes, CDs or thumb drives "laying around" that might contain relevant data. Part of any housecleaning should be the identification and proper preservation, if needed, of such data sources. This inventory will be "Exhibit A" to the Opinion Letter.

5. Finalize recommendations as to disposition and retention as memorialized in the Opinion Letter and prepare supporting "sign-off" and instruction sheets.

6. Implement the recommended data destruction and confirm that the proper destruction did, in fact, take place.

The above steps need to be done in a "reasonable" fashion, not necessarily a "perfect" fashion, and it should not be expensive. It's easy to get lost in the weeds on individual steps or to let other job responsibilities stand in the way of completing the whole process. The retention of a consultant and legacy data expert to prepare and defend the disposition Opinion Letter will provide the insurance policy needed for the lawyers to approve the process and disposition. Naturally, you will also want to implement processes going forward that will prevent the accumulation of unnecessary data in the future.

[8] Guidelines, supra, "The hallmark of an organization's information and records management policies should be reasonableness," (Guideline 1.b) and "Defensible policies need not mandate the retention of all information and documents," (Guideline 1.d).

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    - *Judges' Guide to Cost-Effective E-Discovery*, with Joe Howie, published by the eDiscovery Institute and intended for use as course material at the Conferences for Magistrate Judges; it summarizes earlier surveys and studies by the Institute and is available for free download at: www.eDisoveryInstitute.org/JudgesGuide.
    - "Mandating Reasonableness In A Reasonable Inquiry," *University of Denver Law Review, May 2010, with Patrick Oot and Herbert Roitblat.*