

## Court Sanctions Company for Retention Policy

IN THE LATE 1980S, DR. PHILLIP ADAMS discovered a floppy disk controller malfunction common to many personal computers. After significant time and effort, he figured out several ways to fix the bug, and he patented them. Since then, Adams has filed several lawsuits accusing computer manufacturers of misappropriating his technology.

In the most recent chapter in Adams' fight to maintain his IP rights, a Utah federal magistrate judge's March 30 ruling against ASUSTEK Computer and ASUS Computer International (collectively ASUS) has generated controversy—not over the IP issues involved, but rather over how far a company must go in preserving documents and electronically stored data.

Adams filed a motion in *Phillip M. Adams & Associates v. Dell Inc.*, accus-

ing ASUS of destroying evidence that showed its employees had used his technology illegally. During discovery, ASUS hardly turned over anything, which led Adams to suspect spoliation.

The court imposed sanctions on ASUS, ruling that the company's day-to-day document retention policies were inadequate. In essence, the judge said ASUS's retention policy was too decentralized, and experts say many—if not most—companies would fall into that same category.

Generally, day-to-day retention policies are guided by business needs or industry-specific regulations. In the absence of an anticipated lawsuit, which triggers a legal hold on all documents and data potentially relevant to the litigation, companies are free to make their policies as they see fit.



But in this case, Judge David Nuffer took a different approach: He sanctioned ASUS for what he viewed as an inadequate system for retaining documents in the absence of litigation.

"[There was] confusion in the court," says Adam Cohen, a senior managing director with FTI Technology, an e-discovery company. "The case conflates duty to preserve and retention policy. It's causing a lot of discussion and controversy."

### Problematic Policies

ASUS, like many companies, relied on end-users to decide which documents to save and which to destroy in the absence of a legal hold. "Presumably ASUS' current data is at the mercy of individual employees' backup practices," Nuffer wrote.

In the past, this strategy has been acceptable to judges, as long as a system for preservation kicks in when litigation is anticipated. But that's where the case gets confusing. Nuffer slammed ASUS for not triggering its document preservation plan when it should have anticipated litigation based on other lawsuits happening in the industry.

"If you think about that, that's really hard," says Bruce Radke, a shareholder at Vedder Price. "Large organizations have

a difficult enough time when claims are brought against them, let alone keeping a close track on what everyone else [in the industry] is doing."

Moreover, the judge did not frame his criticism in terms of improper preservation policy while anticipating litigation. He instead critiqued ASUS's normal retention policy. The documents Nuffer

said ASUS should have saved were from as early as 1999, and Adams didn't file his first patent infringement suit until six years later, in 2005.

"I couldn't tell if the court was confused, meant to go down this road or felt boxed in by the facts," says Pete Pepiton, industry solutions director at CA, an IT software management company.

Reading between the lines, Radke suggests the judge smelled foul play, but the facts of the case made it tough to get the proper results without writing the controversial decision—a problem of "bad facts make bad law," he says.

ASUS, which has filed an appeal, did not respond to an interview request. But some think the judge went too far.

"The judge is delving into the day-to-day document retention policy of this company and making a decision as to whether the policy itself is reasonable or not," Cohen says. "That goes against the grain of what most people think, which is, 'As long as you preserve when you have a duty to preserve, who cares what the more day-to-day retention policy is?'"

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### Giving Guidance

Although the decision is controversial, it runs the same direction the document retention industry is already heading. It just runs a lot faster.

Experts also suggest keeping your e-mails in a central archive. "You need to have better access, centrally, to your data because that's what's involved in litigation now," Cohen says.

Centralization of data is becoming more and more necessary to retention. And it's already crucial with preservation of documents in anticipation of litigation, where employees should not be the ones tasked with enforcing a legal hold.

"When you leave preservation up to employees, you're taking a major risk," Cohen says. "If employees fail to maintain data in accordance with your instructions, it's not the individual employee that's going to get punished, it's the company."

At this point, experts accept it may be unfeasible to take all retention duties away from end-users. So for companies without the resources to centralize all their electronic information, they advise giving employees who handle retention the guidance they need to follow corporate policy correctly.

"In-house counsel need to ensure they're providing good advice to employees as to what they need to keep and what they don't need to keep, independent of litigation," Radke says.

—CHRISTOPHER DANZIG

## This is a Test

IT SOUNDS PRETTY BASIC, BUT VEDDER PRICE SHAREHOLDER JEFFREY Davis says ASUS could have avoided the court sanctions if someone had audited its document retention system.

"Even a single time would have been enough to flag the fact that there was a breakdown in the process and that they did need to take a different approach," he says.

When Davis works with clients, he first asks, "Do you have a [document retention] plan?" and when the client says, "Yes," he asks another question: "When's the last time you tested it?"

He recommends running a test search for a random word, such as "elephant."

"If you can't do that, you're turning a blind eye," Davis says. "Even though [Adams] might not end up being the law so to speak, anyone who follows the same fact pattern can expect the same result."