

eDiscovery Update

February 2006

Know When and How to Hold ‘em

Parties have an obligation to preserve records, including Emails, even before a lawsuit is filed. Once litigation is commenced, companies must take reasonable steps to safeguard potentially relevant evidence. Many companies are struggling with developing policies and procedures to comply with these obligations. Indeed, these struggles have been recounted in numerous, well-publicized decisions.¹ This Update discusses best practices for managing Emails, implementing litigation holds and the potential pitfalls that result from simply retaining all Emails. This Update also addresses when litigation is reasonably foreseeable, which may trigger a duty to preserve potentially relevant evidence, such as Emails.

What Emails Should be Retained?

The requirement to preserve evidence pertaining to existing or “reasonably foreseeable” litigation has particularly impacted corporate Email retention policies, often with dramatic results. The *Broccoli*² and *Zubulake* decisions have illustrated the potential liability resulting from a “traditional” policy of retaining Emails for only 21 to 30 days. In response, some companies have gone to the opposite extreme of retaining all Emails indefinitely. This “Hold Everything” approach gives companies the false hope that, by retaining all Emails, it has lessened the chance that it will encounter sanctions, spoliation claims and other eDiscovery pitfalls. But such an approach is fraught with risks. Moreover, companies that retain every single Email are retaining far more than is required.

Companies are obligated by law and industry standards to maintain only those records that:

- document a specific business-related event or activity;
- demonstrate a specific business transaction;
- identify individuals who participated in a business activity;
- support facts of a particular business-related event, activity or transaction; or
- are needed for other specific legal, accounting, business or compliance reasons.

Once the retention period applicable to a record has expired, a company may dispose of it, so long as the record is not germane to existing or reasonably foreseeable litigation.³ These principles apply with equal vigor to Emails.⁴

The Downside of the “Hold Everything” Approach

As noted above, by opting to hold onto all of its Emails, a company may think it is mitigating its litigation and retention risks. In reality, companies using this approach are likely increasing the chance that it may be found liable because it retained a “smoking gun” Email that it was not required to maintain in the first place. In addition to the increased

litigation risks that result from a “Hold Everything” approach, a company’s IT/IS department will likely struggle in implementing such a “Hold Everything” policy, given the massive volume of electronic data that is produced daily. Indeed, an average retail store can generate as much as 1,000,000,000,000 bytes of data per day, and Email volume in the U.S. will increase from over 2 trillion messages this year to nearly 2.7 trillion by 2007.⁵

In today’s technological environment, Emails and other forms of electronic communications (such as instant messages) are created on desktops, laptops, pdas (such as BlackBerries), VOIP, and even cell phones. Because of these advances, and because data storage repositories are regularly backed up for continuity or disaster recovery purposes, a single Email may “live” in multiple places, including a company’s Email server, an employee’s desktop, on offsite backup tapes and elsewhere. This environment compounds the difficulties faced by IT/IS departments, who are often tasked to identify and retrieve Emails for litigation purposes. According to David Cambria, Esq., of Huron Consulting Group, “Managing the data explosion is the single greatest challenge for CIOs. Unlike in-house counsel, IT/IS personnel are more concerned with technology issues such as information sharing, redundancy, continuity and disaster recovery than they are with locating and safeguarding evidence.” This environment can create complex and unnecessary problems for companies that have adopted a “Hold Everything” approach.

There is also the problem and expense of storing too much information. Corporate servers may become overburdened and unstable, with a possible catastrophic loss of information as a result. Nor is transferring all Emails over a certain age to backup tapes without potential risk, because tapes may degrade, are difficult, time-consuming and expensive to search, and may become lost.⁶

Assuming that all of the company’s Emails have been reliably preserved and are searchable, it is time consuming and extremely expensive to process such a massive quantity of data, thereby increasing attorney review time and other discovery related costs. Moreover, there are few records that companies must retain permanently, so the practice of keeping all Emails in a permanent archive or repository may undermine the objectives and success of the company’s records management program.

What to do?

Best practices requires a company to preserve Record Emails in accordance with their overall records retention schedules, and retain Non-Record Emails for only a short period. By regularly disposing of its Non-Record Emails after 21 to 30 days, a company greatly reduces its Email retention burden and may minimize its litigation risks. By also retaining only its Record Emails pursuant to a state-of-the-art retention policy that works in conjunction with a software solution, a company also minimizes storage costs while preserving necessary records.

This approach should improve a company’s litigation readiness and streamline its eDiscovery responses because, by reducing the number of retained Emails on the front end (think of a funnel), fewer Emails must be searched, reviewed and produced in discovery. In contrast, the “Hold Everything” approach increases litigation risks and eDiscovery costs, while making the IT/IS team’s job more difficult.

When is Litigation Reasonably Foreseeable?

Although the duty to preserve potentially relevant evidence may be triggered before a lawsuit is filed, many companies have difficulty answering the question of when litigation is “reasonably foreseeable.” Although the

answer depends on the circumstances of each case, and the following list is by no means exhaustive, courts have found that parties have a duty to preserve relevant evidence where:

- A complaint is filed;⁷
- A discovery request is received;⁸
- A preservation order has been rendered;⁹
- A subpoena has been served;¹⁰
- A government or regulatory agency institutes an investigation;¹¹
- An incident occurs that results in death or serious bodily injury;¹²
- A third-party or non-party requests facts relating to an incident or dispute;¹³
- An attorney requests facts on behalf of a client relating to an incident or dispute;¹⁴
- A potential claimant threatens litigation, verbally or otherwise, to an employee or other agent;¹⁵
- An employee makes a formal complaint to management regarding impropriety by the employer or its personnel;¹⁶ and
- Notification of a lawsuit is received from a third-party.¹⁷

By applying these factors, your company should have a better understanding as to when it must implement a litigation hold. To learn more about best practices for implementing litigation holds, *see* Vedder Price's March 2005 **eDiscovery Update** by linking to our website www.vedderprice.com.

Vedder Price's Records Management Practice

Vedder Price has developed unique expertise in advising clients regarding effective records management and e-Discovery policies, including the development and implementation of electronic communications policies. Its records management team is comprised of attorneys dedicated to enabling its clients to:

- develop and implement clear records retention policies to meet today's legal and business challenges;
- assist in designing and implementing electronic communications policies covering Email, instant messages, voicemail and any other electronic messages;
- audit existing records management programs, including identifying potential compliance gaps and providing practical and proven recommendations for enhancing current policies and procedures; and
- conduct prelitigation assessments of eDiscovery issues and develop comprehensive strategies for aggressively conducting and responding to eDiscovery requests.

If you are interested in learning more about our services, we are presenting executive briefings on these topics in San Francisco, California on March 23, 2006, in Houston, Texas on April 20, 2006 and in Chicago, Illinois on May 4, 2006. To register or learn more about these events, please visit our website at www.vedderprice.com.

For more information, please contact:

Bruce A. Radke, Esq.
312/609-7689
bradke@vedderprice.com

Timothy J. Carroll, Esq.
312/609-7709
tcarroll@vedderprice.com

John B. Thornton, Esq.
312/609-7898
jthornton@vedderprice.com

Notes

- ¹ See, e.g., *Coleman Holdings v. Morgan Stanley & Co.*, No. CA 003-5045AI, 2005 WL 674885, at *9-10 (Fla. Cir. Ct. March 23, 2005) (adverse inference instruction contributed to \$1.45 billion judgment against Morgan Stanley); *Tantivy Communications, Inc. v. Lucent Technologies Inc.*, 2005 WL 2860976 (E.D. Tex. Nov. 1, 2005) (Lucent and its counsel sanctioned for eDiscovery failures).
- ² *Broccoli v. EchoStar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005).
- ³ *Arthur Andersen, LLP v. United States*, 125 S. Ct. 2129, 2131–35 (2005); *Fidelity Nat. Title Ins. Co. of New York v. Intercompany Nat. Title Ins. Co.*, 412 F.3d 747, 750 (7th Cir. 2005) (“[t]here is nothing wrong with a policy of destroying documents after the point is reached at which there is no good business reason to retain them”).
- ⁴ *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW (N.D. Cal. Jan. 4, 2006) (ruling that destruction of data pursuant to valid document retention policy did not warrant spoliation sanctions).
- ⁵ David Hallerman, *Email: Turning Up the Volume*, April 29, 2005, www.imediconnection.com/content/5630.asp.
- ⁶ See, e.g., *Coleman Holdings*, 2005 WL 674885 at *9-10 (finding Morgan Stanley grossly negligent in failing to produce Emails, overwriting Emails after twelve months in violation of an SEC order, failing to conduct proper searches for back-up tapes that may have contained Emails, and failing to notify plaintiff or the Court when it discovered new Emails).
- ⁷ *Applied Telematics, Inc. v. Sprint Communications Co.*, No. 94-4603, 1996 U.S. Dist. LEXIS 14053, at *6 (E.D. Penn. Sept. 17, 1996).
- ⁸ *Id.*
- ⁹ *Keir v. UnumProvident Corp.*, 02 CIV. 8781, 2003 U.S. Dist. LEXIS 14522, at *31–32 (S.D.N.Y. 2003).
- ¹⁰ *In re Tyco Int’l, Ltd. Sec. Litig.*, No. 00-MD-1335-B, 2000 U.S. Dist. LEXIS 11659, at *15 (D.N.H. July 27, 2000).
- ¹¹ *Arthur Andersen, LLP v. United States*, 125 S. Ct. 2129, 2133–34 (2005).
- ¹² *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 748 (8th Cir. 2004).
- ¹³ *Blinzler v. Marriott Int’l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996).
- ¹⁴ *See Id.*
- ¹⁵ *See Testa v. Wal-Mart*, 144 F.3d 173, 177 (1st Cir. 1998).
- ¹⁶ *See Broccoli*, 229 F.R.D. at 511.
- ¹⁷ *See Paramount Pictures Corp. v. Davis*, No. Civ. A. 05-0316, 2005 U.S. Dist. LEXIS, at *12, 29 (E.D. Pa. Dec. 2, 2005).

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

This bulletin is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and interested parties informed on recent legal developments. It is not a substitute for professional advice.

Vedder Price is a national full-service law firm with approximately 225 attorneys in Chicago, New York and New Jersey. Please contact your Vedder Price attorney with any questions or if you need any assistance.

© 2006 Vedder, Price, Kaufman & Kammholz, P.C. Reproduction of this bulletin is permitted only with credit to Vedder, Price, Kaufman & Kammholz, P.C. For an electronic copy of this bulletin, please contact us at info@vedderprice.com.

Chicago

222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Contact: Robert J. Stucker

New York

805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Contact: Neal I. Korval

New Jersey

Five Becker Farm Road
Roseland, New Jersey 07068
973/597-1100
Fax: 973/597-9607
Contact: John E. Bradley

www.vedderprice.com