

THE RECENT COLLAPSE OF ARTHUR Andersen serves as a reminder of the harsh fate that can befall a business when it errs on the side of shredding documents instead of storing them. The case illustrates that it is not enough merely to comply with the document retention policy in place, as Arthur Andersen claimed it had done, but to implement a document retention policy which has as its primary goal the preservation of relevant information. While the downfall of a business in a criminal proceeding may be a rare consequence of a bad or badly followed document retention policy, a wide range of less draconian but nevertheless unpalatable sanctions awaits the destroyer of relevant information who later becomes involved in civil litigation.

Specifically, courts can enter a judgment against the party who destroyed relevant information, thus forever taking away a cause of action if the party is a plaintiff, or imposing liability for an alleged wrong if the party is a defendant. Instead of ending a case in this fashion, a court might refuse to let the party put on certain witnesses who would otherwise testify that the destroyed information is beneficial to that party. Alternatively, the court could allow an instruction to be read which permits the jury to conclude that the destroyed evidence is adverse to that party's case. The court can also impose monetary sanctions against the party or require the party to bear any increased costs associated with the destruction of information, such as the sometimes exorbitant cost of mining a system for deleted data.

The document retention policy of your business is probably a creature of this legal environment. It may have been developed in part to avoid the foregoing sanctions should your business find itself in litigation. The goal sought to be achieved in your document retention policy may very well be the preservation of relevant "documents." However, by focusing on "documents" rather than on electronic media, the policy may no longer achieve the desired goal. Stated bluntly, if the policy was created at a time when the shredder was the document destroying instrument of choice, instead of the "delete" key on a computer, the policy may be out of date and inadequate.

Back when the document retention policy of your business was crafted, the tools of communication involved a typewriter, or a word processor and printer; the mode of communication was the interoffice messenger, the U.S. Postal Service, an overnight delivery service or a fax machine. While electronics may have been involved in the creation and transmission of

## "DOCUMENT" RETENTION POLICIES IN AN ELECTRONIC AGE

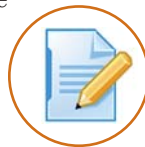
documents, they were always ultimately printed and stored in hard form. Thus, the document retention policy of your business probably identifies which of the pieces of paper generated in the operation of the business and stored in file cabinets and desk drawers must be retained and for how long. However, in an age of electronic communications, most "documents" are not documents at all in the traditional sense. They are "writings" which, although they can be printed on paper, are generally not only created, but also transmitted and stored electronically with nary a trace of parchment, quill pen, ink blotter or their more modern (but soon to be antiquated?) equivalents. In other words, much business is transacted today with little or no paper trail.

The shortcomings of a document retention policy formulated before the advent of e-commerce and e-communications can be illustrated through a simple example. The human resources department of a hypothetical company maintains a personnel file for each employee, and the document retention policy requires the business to retain the file for a number of years after the employment relationship is terminated. Included within the file are annual performance evaluations.

After her third year of employment, Jane Doe is up for promotion but is passed over in favor of John Smith who has been there only one year. All of Jane Doe's annual performance evaluations are stellar, but one of her supervisors takes issue with the promotion. In the old days, he might have had a conversation about Jane Doe with the department manager. The department manager would then have dictated a memo to be placed in her file explaining his decision not to promote her. Instead, her supervisor expresses his reservation in an e-mail to the department manager, and through a series of e-mails on Jane Doe's qualifications for the job, the department manager decides against the promotion.

After a couple of weeks, they each delete the e-mails. None of the e-mails is printed or filed in her personnel file.

When she learns that she did not get the promotion, Jane Doe resigns and a few months later files a claim with the Equal Employment Opportunity Commission which later gives her a right-to-sue letter. Jane Doe promptly files suit in federal court and her employer finds itself defending a claim of gender discrimination. During discovery (the phase of litigation prior to trial when the parties exchange information and witnesses are called for deposition), Jane



Doe's attorney seeks all documents from the employer regarding her failed promotion and her performance history. Jane Doe's personnel file is provided to her attorney. It reflects an exemplary performance history and provides no explanation of why she was not promoted. Her attorney takes the depositions of the department manager and supervisor and asks them why she was passed over for promotion. They each consistently testify that she is not qualified for the position. When asked why the reasons for passing Jane Doe over for promotion were not documented, they each testify that their explanation can be found in a string of e-mails they exchanged with each other.

This revelation launches a war within a war. Each side is sure that the deleted e-mails are smoking guns in its favor. The employer is convinced that the department manager's reasons for denying the promotion are valid, performance related and explained in the string of e-mails he exchanged with her supervisor. Jane Doe is convinced that her supervisor and the department manager engaged in a misogynistic tirade against her. The judge must decide what to do about the deleted e-mails.

For starters, the judge must determine whether the employer had a duty to preserve the string of e-mails. There is little question that a duty to preserve relevant information attaches when (1) a party is served with a lawsuit that puts it on notice that information in its possession may be relevant to resolution of the other party's claims against it, (2) one party in litigation requests that information in possession of the other party be turned over, or (3) the court issues an order requiring the preservation of specified information. However, the duty to preserve relevant information can actually attach long before the initiation of litigation. Generally, a party is under a duty to preserve relevant information when it reasonably anticipates litigation.

Returning to the case study, the court is very likely to conclude that the employer should have reasonably anticipated litigation the moment Jane Doe resigned upon learning that she was not promoted. Thus, the judge will find that the employer failed to preserve relevant information when it was under a duty to do so. If the e-mails are recoverable from the system, the court is likely to impose the cost of the recovery effort on the employer. If the e-mails are not recoverable, the court could end the case by entering judgment in Jane Doe's favor. A more likely result is that the court will allow the jurors to be instructed that they can assume that the contents of the deleted e-mails are adverse to the employer. The court might also refuse to allow the supervisor and department manager to testify why they were against the promotion, thus leaving the employer with no reason to give the jury as to why Jane Doe was not promoted.

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Ironically, the employer's document retention policy as written was followed. Jane Doe's personnel file was retained and given to her attorney in the litigation. The results of the litigation are therefore a particularly bitter pill for the employer to the extent that the e-mail string in fact identified valid reasons for not promoting Jane Doe. Those e-mails should have been preserved, and a document retention policy which takes into consideration the realities of modern communication may have resulted in their preservation.

This case study illustrates two problems with document retention policies in an electronic age. First, because such policies do not always assist employees on how to determine when to anticipate litigation, employees may be innocently destroying relevant information with one keystroke before they have been informed of the necessity to preserve that information in a particular case. A good retention policy might therefore call for the preservation of a broad category of information in the ordinary course of business so that when litigation is reasonably anticipated in any given case there is some assurance that all relevant information has already been preserved.

Second, the case study highlights a simple yet profound problem with "document" retention policies in an electronic age: the word "document" is a misnomer. Because courts require parties to preserve relevant "information," whether or not that information is on paper, retention policies narrowly focused on "documents" fail to provide any policy on the preservation of electronic information. Today's businessperson knows that information is created and stored, oftentimes in more than one version, on all kinds of electronic media, including hard drives, networks, floppy disks, DVDs, CDs and magnetic tapes. Does the "document" retention policy of your business inform those employees who handle each of these electronic media what electronic information to preserve, how and where to preserve it and for how long? If not, it is time to make the information retention policy of your business as current as the systems which produce that information. The cost for not doing so may be more than you or your business can bear.

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