

MANAGING YOUR PAPER TRAIL

BY TODD REUTER

DO YOU KNOW WHERE YOUR FILES ARE?

DEVELOPMENTS IN COMMUNICATIONS technologies promised to free us from the printed word, but the paperless office never materialized. In fact, both paper and electronic records have increased, creating backlogged inboxes both on your computer and on your desk. And, if you're like most people, that current set of documents likely grows exponentially every day.

From a legal perspective, this might be a problem. The more documents you have, the more you will need to produce in "discovery" should you find yourself in the middle of a lawsuit.

"Discovery" is the process by which adverse parties obtain documents and testimony from each other. It is often the single most expensive, distracting and potentially dangerous phase of a lawsuit. In fact, it's not uncommon for the cost of finding and producing company records to surpass the value or importance of what is at issue in the dispute.

Why? The short answer is that businesses often keep too many records. When their litigation opponent demands production of "all records relating to . . .", business leaders are confronted with the duty to scour their records and produce what often amounts to many thousands of pages of historic records, including e-mail. Much of this will have no relation to the case, but must be produced under the discovery rules.

Adding to the cost and inconvenience is that your lawyer is under an ethical duty to make sure you produce all responsive documents. He or she must take command of the search, which includes coming to your office and meeting with your key personnel to discuss where documents are, how they are stored, and how to retrieve them in a safe and organized fashion. Recent case law spells an end to the days of the lawyer just telling you to find the documents and send them in. Instead, your lawyer will often have to capture the contents of your computer and cart off the contents of your file cabinet drawers for copying. People often use e-mail rather than the telephone, creating a "written" record of everything that you and your employees say. Producing this can be a nightmare.

You need a plan to deal with this so you have a fighting chance at minimizing both cost and disruption.

USE A DOCUMENT RETENTION PLAN

Perhaps the easiest and most effective approach is to have and use a document retention plan. Certain documents may need to be retained for a number of years set by statute. Most, however, do not. Document retention

programs allow for an orderly lightening of the load in a way that protects you from accusations that you intentionally destroyed evidence (recall the Arthur Andersen and Enron disaster). Such a program must be consistently followed. Electronic "janitor" software is available for this purpose.

Once you hear about a possible legal dispute, however, you must suspend all document destruction and meet with your lawyer about how to go forward. Before then, you will save yourself significant time and money by not keeping – and therefore not having to produce – the mountain of documents that your lawyer would otherwise have to read and produce.

You will also reap rewards from having your documents organized. In the electronic world, there are so many more places to store "documents" than your file cabinets. Documents can be stored on the phone, PDA, voice message machine or laptop of each of your employees. Set some internal guidelines regarding where documents should and should not be kept.

MANAGE YOUR DELETED FILES & BACKUP TAPES

Another way to minimize the burdens of discovery is to manage your deleted files and backup tapes. Discovery rules are written to allow you to avoid the production of documents that are too costly to retrieve, such as those contained on backup tapes. The purpose of the tapes is to guard against disasters, including fire, flood and virus. Courts may not require you to produce backup tapes if your lawyer can establish that is the way the tapes have in fact been used. You weaken that argument if you have in the past allowed employees to access the backup tapes as a way to retrieve documents that were unintentionally deleted. That may be tough for an employee who has to recreate a document he or she accidentally deleted, but your refusal to open up backup tapes to get the deleted document may pay great dividends if you avoid having to copy, review and produce those tapes in litigation.

Adding a risk management approach to document retention is smart business, even if it brings some initial cost and effort. Developing a plan for creating, storing and retrieving documents will pay dividends if and when a litigation opponent demands discovery. 

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