

BY WILLIAM B. DODERO AND THOMAS J. SMITH

CREATING A STRONG FOUNDATION FOR YOUR COMPANY'S
RECORDS MANAGEMENT



PRACTICES



Congratulations! You've started your first day as in-house counsel for a great company. Along with the traditional visits to the Human Resources department, those initial meetings with new co-workers (who really should wear name tags for the first week or so), and the slow process of learning to navigate your new office, you discover that an ediscovery request has landed on your desk. What is your new company's procedure for addressing such a request? How does your company manage its records? How much is the IT Department involved? Is your company's records management policy compliant with the new Federal Rules of Civil Procedure (FRCP) that became effective last December? You need some answers before responding to this request.

The scenario above illustrates how important issues related to records management have become. Because of advances in electronic communication and data storage, companies today can exchange electronic information at blinding speeds and in massive amounts. While the ability to communicate and record business matters through electronic means has increased productivity, this ability also places new burdens on companies regarding their need to manage this unprecedented volume of records in an effective manner.

In response to the increased significance of records, and especially electronic records, to both commerce and litigation, statutes, and regulations, the rules addressing issues related to records management have been changing on both the national and state levels. The federal government and state governments have passed legislation mandating the retention of certain types of records for set periods. Furthermore, the FRCP was amended in December 2006, to provide a framework by which litigants and courts must give early attention to issues relating to the disclosure and discovery of electronic records.

A number of recent high-profile cases have highlighted the need to manage business records effectively and the necessity of preserving these records in light of an actual or expected litigation or investigation. For instance, several large companies have found themselves subject to court sanctions, adverse jury verdicts, and bad publicity in recent months because of their lack of care in the storage and maintenance of their email and back-up systems. Also, the Sedona Conference has offered legal practitioners guidance with regard to records management and ediscovery through its advisory reports, principles, and guidelines.

In view of these recent legal developments, your company should take proactive steps to develop policies and implement practices to improve their management of records management practices.

Developing a Record Retention Schedule

To improve its records management practices, your company should develop a records management policy that addresses how it handles its records and that defines the obligations of employees with regard to records management. The foundation of an effective records management policy is the establishment of periods for which certain types of records, as defined by their content, must be retained.

An effective record retention schedule informs employees about how long to retain business records and when they may dispose of these records safely. Disposing of business records in a timely and appropriate manner can decrease the costs of managing these records, and can also reduce the risks and potential liabilities associated with retaining these records beyond the time required by law and business necessity. Accordingly, your company should create and follow a record retention schedule as part of its broader records management policy and its efforts to reduce litigation risks.



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When making such a schedule, your company may benefit by thinking ahead and determining whether its current records management capabilities are sufficient to fulfill the demands of implementing such a schedule and, more broadly, a comprehensive records management system. Often, companies delegate recordkeeping responsibilities to employees that lack the resources and training to comply with the obligations assigned to them. Your company may need to adopt electronic records management programs to assist employees in complying with the retention schedule's directives regarding certain types of information, such as unstructured data. The adoption of records management resources by your company can help to ensure compliance.

The creation of a record retention schedule involves two basic steps. *First*, define categories for the records created and received. *Second*, decide how long to retain records within each category.

Defining Categories of Records

The process of categorizing your company's records necessitates involving employees throughout the company. Often, the diversity among and volume of records handled by

The Sedona Conference Guidelines on Record Retention

In response to the growing concerns of courts and litigants about the discovery of electronically stored information, the Sedona Conference, a national charitable research and educational institute working to advance law and policy related to antitrust law, complex litigation and intellectual property rights, sponsored a Working Group, consisting of judges, attorneys, and technologists active in the fields of electronic discovery and records management, to examine and address these concerns. In September 2005, this Working Group published *The Sedona Guidelines for Managing Information and Records in the Electronic Age*, available at www.thesedonaconference.org/dltForm?did=TSG9_05.pdf, which articulates core principles and best practices with regard to records management. Appendix D to these guidelines is particularly helpful, as it provides an outline of questions to use when assessing a company's records management policy and record retention schedule.

a company every day can make it difficult to define its records easily. Each company and department within a company, which handles a certain kind of record, may use different terms to refer to that record. In addition, a single record may serve several functions within a company, thereby making categorization more difficult. Therefore, as your company starts to define categories of records, it must seek the input of representatives from the company's different business units and departments, as well as IT personnel and records management staff.

While this comprehensive approach to categorizing your company's records requires significant involvement from a wide variety of employees, it results in the development of record categories that are individualized to the company's

business needs. Because a single company is unlikely to create or receive every possible type of record, such individualization allows your company to avoid including record categories that are unimportant to its business.

Such individualization also allows your company to name and describe its record categories in a way that all of its employees will easily understand. For example, the retention schedule's description of a record category may include the different names used by various departments for a record in that category, or it may describe the different forms commonly used to create records in that category. In this way, the development of an individualized record retention schedule facilitates employee comprehension and implementation of the schedule.

Sampling of Record Retention Periods Mandated by Federal Law

RECORD TYPE	RETENTION PERIOD
Employee benefit records, including: <ul style="list-style-type: none"> • cafeteria plan administration • COBRA insurance administration • education assistance records • records relating to the Family and Medical Leave Act • records relating to the Health Insurance Portability and Accountability Act • insurance contracts, plans, and booklets • records about matching gifts • pension plan records • records about profit sharing plans and savings plans • sick leave records • vacation records 	Longer than 6 years after the filing of the plan or 1 year after the termination of the plan 29 U.S.C. § 1027 (2005) (concerning retention of records relating to employee benefits) 29 C.F.R. § 4007.10 (2006) (concerning retention of pension plan records subject to ERISA) 29 U.S.C. § 1627.3(b)(2) (concerning retention of these records under the ADEA)
Employee seniority and merit systems	1 year from termination of system 29 C.F.R. § 1627.3(b)(2) (2006) (concerning retention of these records under the rules of the EEOC)
Advertisements, public notices, or notices to employees about job openings, promotions, training programs, or over-time opportunities	1 year from the resulting employment action 29 C.F.R. § 1627.3(b)(1)(vi) (2006) (concerning retention of these records under the rules of the EEOC)
Job orders to an employment agency or labor organization for recruitment of personnel	1 year 29 C.F.R. § 1627.3(b)(1)(iii) (2006) (concerning retention of these records under the rules of the EEOC)
Job applications and résumés sent in response to notice of a job opening	1 year from the decision to hire or not hire 29 C.F.R. § 1627.3(b)(1)(i) (2006) (concerning retention of these records under the rules of the EEOC)
INS employment eligibility verification (I-9) forms	The longer period of either 1 year after date of employment termination OR 3 years after date of hire 8 C.F.R. § 274A.2(b)(2)(i)(A) (2006)

When categorizing its records, your company must determine whether it needs to create a schedule with detailed and narrowly-defined record categories, or whether it requires only a handful of broadly-defined record categories in its schedule. A schedule with many narrowly-defined record categories can allow your company to tailor its retention of records more closely to relevant legal considerations and business needs. However, the presence of narrowly-defined record categories can require greater attention from implementing employees, and the high number of record categories can lead to confusion where a record appears to conform to multiple categories. Further, as the number and detail of categories increases, the risk of non-compliance with the retention schedule often increases as well. Simply put, greater complexity in the schedule typically allows more chances to miss something.

On the other hand, a schedule with only a few broadly-defined categories may be easier for employees to implement. However, the breadth of these record categories will necessarily lead to the retention of some records beyond what is legally required or useful to the company, since the

retention periods assigned to these broad categories must be long enough to account for all types of records within each category. A company can decide how broadly to define its record categories in its retention schedule by balancing the additional costs associated with creating and implementing a retention schedule with narrow record categories against the risks presented by retaining some records for longer than necessary because of the schedule's use of broad record categories.

While defining the record categories for its record retention schedule, your company should also consider which employees, business units, departments, and geographic locations handle different categories of records. This consideration may affect your company's decision on whether to create a single, all-inclusive retention schedule to implement at every location and function unit of the company, or whether to craft a number of specialized retention schedules for the use of specific locations, business units, and departments.

Each of these methodologies presents particular benefits in certain situations. Companies in which business units are differentiated to the degree that each unit only handles certain record types may benefit from a number of specialized retention schedules, since employees in each business unit could familiarize themselves with the limited range of record categories found in such specialized retention schedules more easily.

Conversely, companies with employees that often encounter a diverse variety of record categories may benefit more from a single all-inclusive retention schedule, since these employees would only have to refer to a single reference when determining the company's retention obligations. Regardless of the methodology used to create your company's retention schedule(s), it is paramount that the company employs consistent retention periods, as courts may view any inconsistencies in record retention with suspicion.

Assigning Retention Periods

After defining the record categories relevant to the company, your company must assign a retention period to each of these record categories. Because the primary function of the record retention schedule containing these retention periods is to instruct employees on how long to retain any given record they handle, the retention periods should be clearly set as a fixed period of time that runs from a readily-ascertainable date. If the retention periods are indefinite and vague, or if the time at which the retention period should begin to run is undefined, employees will be forced to use their own discretion to make unnecessary judgment calls on important record retention determinations. Thus, clearly fixed retention periods are vital to ensuring consistent application of the record retention schedule.

Recent Amendments to the Federal Rules of Civil Procedure

On December 1, 2006, after years of drafting, commenting, and revising, amendments to the FRCP went into effect providing a framework for litigants and courts to give early attention to issues relating to the disclosure and discovery of electronically stored information:

- 1. Rule 26(f): Adds an early ediscovery meet and confer requirement to address preservation, form of production and protection against privilege waiver.
- 2. Rule 26(b)(2): Sets forth that a party need not provide the discovery of electronically stored information that is "not reasonably accessible," unless ordered by the court for good cause.
- 3. Rule 26(b)(5): Provides a procedure for asserting privilege after inadvertent production of privileged information in an effort to limit inadvertent waiver.
- 4. Rule 33: Requires parties to specify whether they seek discovery of documents, electronically stored information, or both, and addresses the objection and dispute resolution procedure.
- 5. Rule 37: Addresses a party's inability to provide discovery of electronically stored information lost as a result of the routine operation of a party's electronic information system—a sanctions "safe harbor."

Cases Showing Consequences of Poor Records Management

Pursuant to a court's inherent power to police litigant conduct and FRCP 37, sanctions can be imposed for "spoliation"—the destruction or alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

- *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005). *Adverse Inference and Monetary Sanctions Imposed for Failure to Halt Email Recycling Program*. In 2005, the District of Minnesota imposed monetary sanctions and granted an adverse inference instruction against a securities company after finding that the company failed to preserve potentially relevant emails and other electronically stored information. While the court could not find that spoliation of paper documents occurred, it determined that the defendant's destruction of hard drives, allegedly pursuant to a business closure, its destruction of telephone recordings pursuant to its standard business practices, and its failure to retain email messages by either placing a litigation hold on email boxes or preserving backup tapes with copies of potentially relevant emails prejudiced plaintiffs so as to merit the sanctions imposed.
- *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006). *Order Precluding Evidence, Granting an Adverse Inference Instruction, and Awarding Attorneys' Fees Imposed for a Small Number of Emails Lost Pursuant to a "Long-Standing" Document Policy*. In this case, the Northern District of California imposed sanctions against a defendant, an investor in Napster, Inc., in a copyright infringement action regarding musical compositions. After learning that the defendant's employees routinely deleted emails pursuant to the defendant's "long-standing" document policy, without regard to whether the deleted emails were relevant to the litigation, the court issued an order precluding certain evidence, granting an adverse inference instruction, and awarding attorneys' fees. The court determined these sanctions to be the appropriate remedy despite the fact that the defendant's conduct did not constitute a pattern of deliberately deceptive litigation practices and notwithstanding evidence that the number of emails actually lost was small.

When assigning a particular retention period to a record category, consider the following:

Legal Requirements on Record Retention

As mentioned previously, the federal and state governments have enacted statutes and regulations that mandate the retention of certain types of records for set periods. Because these legally-mandated retention periods vary by jurisdiction, your company must consider the jurisdiction in which it conducts business and comply with any applicable record retention laws within those jurisdictions. Often, it may be simpler for a company to adopt a record retentions schedule containing the longest applicable legally-mandated retention periods among those jurisdictions in which it operates. By adopting the longest of these periods, a company can implement a single retention period for each category in all of its locations, which makes implementation of the schedule easier, particularly when records management functions are centralized in only one or a few company facilities.

Where applicable, these legally-mandated record retention periods provide companies with a minimum period to retain records in the specified categories. However, legally-mandated retention periods do not exist for every type of record. Indeed, most types of records possess no legally-mandated retention period in any jurisdiction. For such categories of records, other considerations are paramount in establishing the proper retention period.

Other Legal Considerations Relevant to Record Retention

When defining retention periods for its record categories, your company should consider other legal factors, such as relevant statutes of limitations and the company's litigation profile and anticipated litigation risks. While not placing an affirmative duty on your company to retain records for a specific period, these factors should influence the extent to which relevant categories of records should be retained. For example, the various statutes of limitation on contractual claims for the jurisdictions in which your company operates may dictate how long your company decides to retain copies of its contracts.

Likewise, your company's litigation history and its expectation of litigation in the future can be additional considerations that influence your company's assessment of the risks involved in keeping specific kinds of records. While such considerations do not create a duty for the company to retain records, they may affect your company's desire to retain certain records to preserve its legal rights and to protect its interests. For example, your company may choose to preserve certain types of records for longer than legally necessary because it anticipates the need for these records as evidence in future actions aimed

at enforcing certain rights, such as rights under intellectual property laws or licensing provisions. Another source to consult is ARMA International, a not-for-profit association and authority for managing records and information—paper or electronic: www.arma.org.

Continued Business Utility and Historical Significance of the Records

Your company should also consider how long it derives continued business or historical value from certain records before assigning a retention period to the categories to which these records belong. Even in instances where different companies possess identical records, each company may find a different level of business usefulness in the record as the record ages. In some cases, the business needs of the company may require it to retain a select group of records on a permanent basis.

Likewise, a company may wish to keep a record for historical or reference purposes. Many companies need to retain some categories of records for a significant amount of time in order to inform ongoing research or to create a historical reference of past dealings. By considering the continued business and historical value of certain categories of records, your company can further tailor its retention periods to its own unique needs.

Continued Costs and Risks Associated with Extended Retention of the Records

For each day that your company retains records beyond what is legally required or useful to its business, your company incurs a number of costs and risks.

1. Your company is forced to divert some of its technological and administrative resources to maintain these records in hard copy and/or on its computer system.
2. The continued presence of these records will make future searches and reviews of your company's records for both business and litigation purposes more time-consuming and, therefore, more costly.
3. Continued maintenance of these records increases your company's risks that the records will become the subject of a future discovery request, which will entail additional costs and can possibly lead to liabilities that could have been avoided if the records' retention period had been shorter.

Therefore, each of these factors should be considered when deciding whether to extend the retention period of a record category.

Implementing a Record Retention Schedule

The first step toward effective implementation of a record retention schedule is the education of those employees that must implement it. Your company's employees must be

trained about the company's overarching records management practices, and your company should explain to them how the record retention schedule provides standard retention periods for defined categories of records.

This training must highlight how employees are to follow these retention periods strictly. One important objective of such training should be to instruct employees about how to properly retain records during their necessary retention periods. Another important training objective is

ACC Extras on... Records Management

InfoPAKSM

Records Retention (2006). This InfoPAKSM provides an overview of guidance from selected questions and issues posed by Jordan Lawrence's client base. Additionally, outside attorneys were asked to participate by providing their insights from working with corporate clients.

www.acc.com/resource/v5206

Surveys

Survey of Corporate Records Practices of 2006. Jordan Lawrence conducted a survey of several hundred corporate attorneys. Their feedback uncovered company problems including over-retention of records, poor record naming standards, general dissatisfaction with policies, and the inability to enforce policies. www.acc.com/resource/v7542

Webcasts

- *Emerging Technologies for Finding and Mapping Discoverable Information* (2006). Presented by Xerox Corporation. Presenters for this webcast focus on identity mapping and data mining and will discuss emerging approaches for using technology to find the information most important to you, when you need it. www.acc.com/resource/v6717
- *The New Federal Ediscovery Rules: How Your Ediscovery and Records Management Practices Should be Revised for Compliance* (2006). This ACC webcast discussed the practical effects of the FRCP rule changes on December 1, 2006, and how they promise to impact existing practices concerning the records management and ediscovery practices. www.acc.com/resource/v7640

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to teach employees about how to conduct the timely and appropriate disposal of records at the end of these retention periods. Employees must also be trained that the retention schedule applies to all company records except in the event of a record hold, which will be triggered by an actual or reasonably anticipated litigation, subpoena, governmental examination, internal or external investigation, or enforcement proceeding. Employees should be informed about how they will be notified of a record hold through a record hold notice, which they are responsible for reviewing and following for the duration of the hold, regardless of what the record retention schedule lists as the retention periods for records in those categories.

In order to ensure the most effective implementation of its record retention schedule, your company should keep accurate indexes of all hard copy records in both its on-site and off-site archives. Such indexing, which should include the categories of records contained in each

archived file and an adequate description of the records in the file, can allow your company to dispose of archived records without having to undertake costly retrievals and reviews of these archives. Instead, your company can rely on its indexes to determine whether it may appropriately dispose of these archived records in light of the retention periods set by the schedule.

Automated computer programs can also facilitate the implementation of retention schedules. Existing computer programs allow companies to define electronic record categories and to associate these categories with retention periods. In using these programs, employees are required to categorize records upon their creation, receipt, or revision. After the retention period associated with that record expires, the automated computer program, in the absence of a relevant record hold, would automatically dispose of that record. The use of such computer programs may be cost-prohibitive in certain circumstances, but should be duly considered by a company developing or refining its record retention schedule.

Similarly, your company's email system can be amended to include automated email deletion protocols that dispose of messages in selected folders after a certain time period. When paired with user-controlled email foldering practices and when subject to suspension during record holds, such automated deletion protocols can help reduce the risks and costs associated with the maintenance of extraneous email.

Basic Record Hold Checklist

The following checklist describes steps that many companies include in their procedures for implementing and documenting record holds.

Preparing for a Record Hold

- Define the events, including actual or reasonably anticipated litigation, subpoenas, governmental examinations, governmental or internal investigations, or enforcement proceedings that trigger a record hold.
- Assign responsibility for issuing and monitoring record holds.
- Enumerate the sequential steps necessary in issuing a record hold notice.
- Address how relevant individuals and records are identified.

Issuing a Record Hold

- Issue record hold notices to relevant company personnel upon a triggering event.
- Verify receipt of record hold notices.
- Verify compliance with record hold notices by recipients, as necessary.
- Suspend all relevant automated deletion protocols.
- Suspend paper document destruction for all potentially relevant records.
- Issue reminder notices and modifications, as needed, regarding the record hold.
- Terminate the record hold and alter record hold notice recipients of this termination when the triggering event has ended.

The Consequences of an Inadequate Record Hold


In January 2007, the Southern District of New York granted a plaintiff's motion for sanctions in the form of an adverse inference instruction and an award to the plaintiff of the costs and attorneys' fees it incurred in connection with its sanctions motion, as well as additional discovery costs where the defendant was able to produce emails for only thirteen out of the 57 current and former employees identified as "key players" in the suit. While the defendant sent out record hold notices early in the case, it failed to issue a reminder notice after going through a corporate reorganization that resulted in the creation of two separate entities, and, moreover, the recipients of the initial hold notices ignored them. The court explained that, in the Second Circuit, the "'culpable state of mind' requirement [for the granting of an adverse inference instruction] is satisfied . . . by a showing of *ordinary negligence*." *In re NTL, Inc. Sec. Litig.*, 2007 WL 241344 at *19 (emphasis added).

To ensure continued compliance with all pertinent legal requirements and business needs, your company should regularly review the retention schedule. Additionally, your company should routinely audit compliance with the schedule to ensure that both employees and automated computer programs are operating in line with the schedule. Finally, your company should consider auditing any off-site or vendor-operated record repositories to make sure that no information is retained beyond the period provided in the retention schedule.

Your company should consider maintaining documentation, including records of the retention schedule and its

revisions, records of the schedule's development, retention procedures that work in tandem with the schedule, and record disposal information, in order to aid in such review and audits. Such documentation can also serve as evidence of the routine, good faith operation of the company's records management system, which may prove helpful during litigation involving electronic records.

Scheduling—A Necessary Step Toward Effective Records Management

By developing and implementing a record retention schedule, your company can take an important step toward improving its records management practices. While the decisions involved in creating a retention schedule require considerable attention from a variety of employees, the result can allow your company to reduce its costs associated with records management and to limit its risks and potential liabilities associated with improper records management and future litigation. 

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Sample Audit Questions for Employees

- What records are created, received, or managed as part of your departmental duties?
- Do you and your department maintain records in hard copy, electronically, or both?
- Are you aware of your requirements generally for preserving corporate records?
- Are you aware of the company's record retention schedule and its broader records management policies and practices?
- What policies do you and your department follow regarding records management?
- Do you receive training for compliance with your company's records management policy and schedule?
- In practice, how do you and your department manage hard copy records and electronically stored information?
- How do you and your department handle email and other electronic communications?
- Have you or your department received and implemented record holds?
- Have you or your co-workers received recognition for good records management practices?
- How often does your department review the record retention schedule for accuracy?
- How does your department ensure that it disposes of records that have reached the end of their retention period?
- What records does your department keep regarding the process of disposing of records?
- Are your company's vital records appropriately designated?
- Does your department have a records coordinator?

For further guidance, refer to sections 3:5 and 3:28 of *Corporate Compliance Series: Records Retention* by J. Edwin Dietel.

Safe Harbor for Lost Electronic Records?

Recently amended Federal Rule of Civil Procedure 37(f) is the so-called "safe harbor" rule, and it states that, "[a]bsent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." However, this "safe harbor" provision, by its own terms, appears quite limited. The amended rule leaves to the court considerable discretion to determine whether the "information lost" was lost "as a result of the routine, good faith" practices of the party who lost the information. Further, even if the court finds that the information was lost in good faith, the court has the further discretion to determine that "exceptional circumstances" exist and to impose sanctions anyway. The bottom line is that this harbor may not be so safe.