

Records Management and Document Retention

**North San Antonio
Chamber of Commerce
CFO Forum**



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Electronic and Paper Documents Are Generated and Stored Impact All Aspects of Your Business

Business Risk

Identify documents
that are important and
should be preserved
in order to
protect the business
in the event of litigation,
audit, employee disputes



Legal Compliance

Federal and state laws
contain recordkeeping
requirements

- **Litigation Avoidance/Litigation Expense** -- data leaks, scope of documents retained
- **Employees** -- monitoring employee activities; performance enhancement
- **Marketing** -- pricing and strategy discussions
- **IT Systems** -- storage; systems design



ANDERSEN

The Arthur Andersen partner was on his cell phone
when he said,

"Ship the Enron documents to the feds,"

but his Secretary heard,

"Rip the Enron documents to shreds."

It turns out that it was all just a case of bad cellular.



Sprint PCS The clear alternative to cellularSM



Document Retention Policies

- Why????
 - Save valuable computer and physical storage space
 - Reduces volume of stored documents and data
 - Avoiding spoliation claims
 - *In re Prudential Ins. Co. of Am. Sales Practices Litigation*: Prudential had “no record of any written manual that would evidence that Prudential possesses a clear and unequivocal document preservation policy capable of retention by Prudential employees and available for easy reference.”
 - *Linnen v. A.H. Robins*: The Defendant sent emails and voicemails to all of its employees advising them to save all relevant documents. The Defendant, however, failed to stop its back-up tapes from being recycled or taped-over. Jury instructed to assume smoking gun.
 - Default or dismissal possible.
 - Lowering Litigation Costs – be sure your policies address both Hard Copy and Electronic Files

Document Retention Policies

- Why????

- Removing “Smoking Guns”

- Prior to Litigation: *Arthur Anderson LLP v. U.S.*, 544 U.S. 696 (2005): that “under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the govt.”
 - After Litigation Filed: *Zubulake v. UBS Warburg LLC*: Counsel failed to warn its client to not delete or recycle back-up dates of technological data. The Court ordered the Defendant to bear the substantial cost of restoring the back-up tapes.

- Fines - \$2.75M – Philip Morris USA

Document Retention Policies:

Protecting Trade Secrets

- Why????
 - Bolstering trade secret protections
 - How are electronic and hard copy documents containing trade secrets retained?
 - Who has access?
 - Your trade secrets could lose legal protection by failure to electronically secure the information/manage the distribution of documents

Document Retention Policies

- What Should be Included:
 - *Lewy v. Remington Arms Co.*
 - whether the policy is reasonable considering the facts and circumstances surrounding the relevant documents
 - whether the destroyed documents are relevant to pending or probable lawsuits; and
 - whether the policy was instituted in bad faith
- Consistency is the Key
- Company wide – this is not just an accounting/finance or legal department issue

Retention Policies

- Electronic documents
 - *Be aware of all locations where electronic documents reside*
 - CEO's hard drive?
 - PDA's
 - Extranets?
 - Telephone systems – especially VOIP

Retention Policies

- Weigh cost and logistics of saving valuable electronic and hard copy data
 - *Designing the right policy from the beginning is key*
 - Legal advice is highly recommended
 - *Incorporating the right technology from the start to control costs*
 - Hiring the right IT employee/consultant

Document Retention Policies

- Review all applicable law [See Handout]
- Take into account statute of limitations
- Clearly describe the class of documents to which the policy will apply (i.e. drafts, finals; backup tapes)
- Specify the retention period for each class of documents
- Create procedures detailing how the program will be *implemented and enforced*
- Identify the staffer responsible for *policing and maintaining the program*; Train them

Document Retention Policies:

When Litigation Arises

- Allow alternatives to, or even suspension of, document-destruction procedures when a duty to preserve arises
- The “Litigation Hold”
 - Prevent Your System from Automatically Deleting Data
 - Stop the Automatic Recycling of Backup Tapes
 - Stop the Automatic Recycling of Personal Computers
- Reissue the “Litigation Hold” – New Employees!
- Identify Key Players/Employees – Special Notice
- Consider Forensic Images of PC’s
- Designate one IT person who will be your Companies Federal Rule of Civil Procedure 30(b)(6) deposition witness (document preservation, chain of custody, etc.)



Handout on Document Retention Policies

- My example
- ABA - form of Document Retention Policy available at <http://www.abanet.org/lpm/lpt/articles/sampledcretenetionpolicy.pdf>
- Arthur Andersen Document Retention Policy



"You should check your e-mails more often. I fired you over three weeks ago."

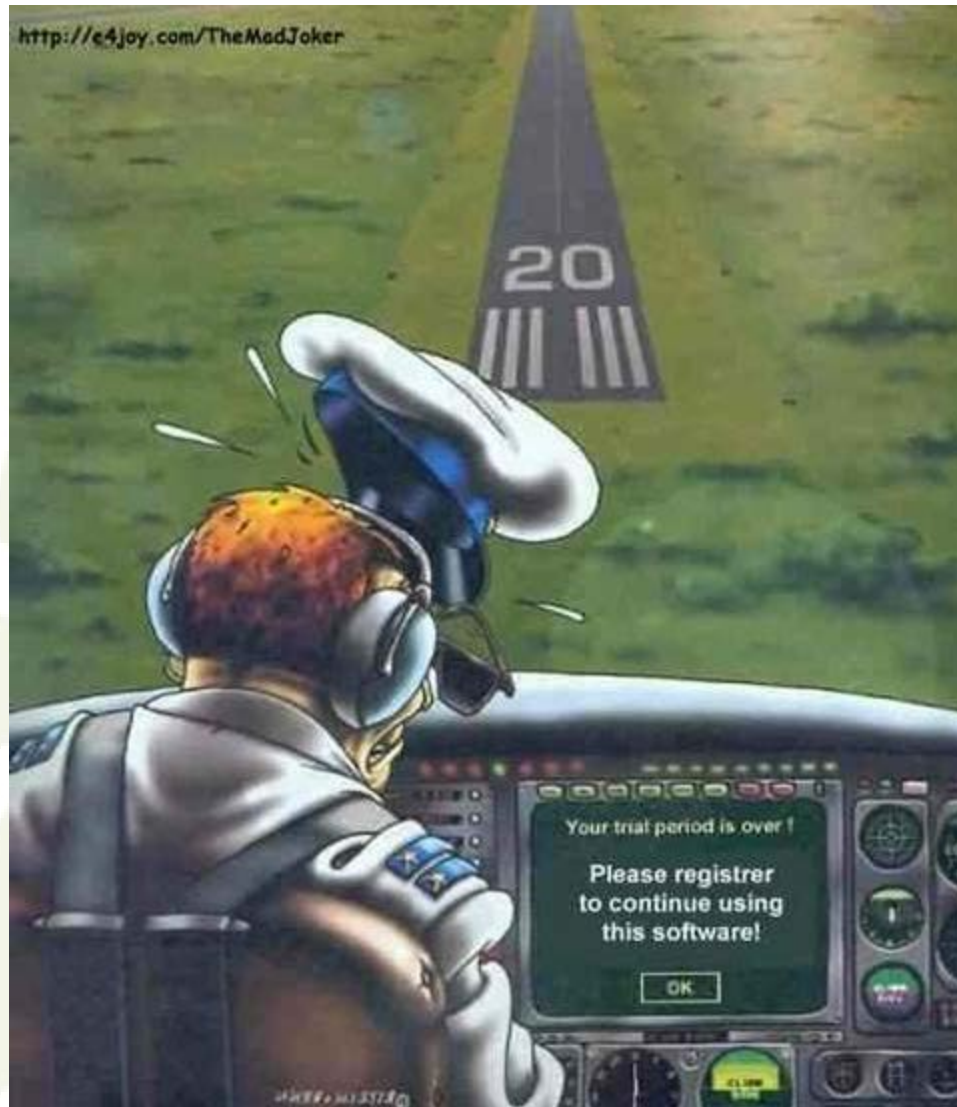
Employees Use of Technology and Employer's Response

- 76% of Employers monitor web activity (blogging, chat and message boards, porn/gambling sites)
- 55% of Employers retain and review email messages
- 36% of Employers track content/keystrokes/time spent at keyboard

Source: **2005** Electronic Monitoring & Surveillance Survey by
American Management Association and The ePolicy institute



<http://e4joy.com/TheMadJoker>



Software Usage Policies

- The BSA* and SIIA** are not your friends
 - May 2006 – Losses from piracy - \$34B
 - 35% of all copies of PC software installed worldwide in 2005 pirated
 - They want their money!!!
- Gartner:
 - 40 percent of all medium-to-large U.S. businesses will face an external software audit by the end of 2006
 - less than 25 percent of public companies have mature software asset management processes
- What to do: This is a Legal Matter, not an IT matter;
Educate your C-levels

* BSA: Business Software Alliance (Membership Examples: Microsoft, Cisco, Symantec)

**SIIA: Software and Information Industry Association
(Membership Examples: Adobe, Intuit, McAfee)



Questions?

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