

Retention in the Eyes of the Courts and Adversaries

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Best Practices



**Are the courts
providing guidance
on acceptable
practices... best
practices?**

Evolution of a “Reasonableness” Standard

- ***Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984)**
 - Defendant’s document retention/destruction policy had as its stated purpose – to eliminate documents that might be detrimental to it in a lawsuit.
 - Court noted a “reasonable” document retention program might survive judicial review.

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Evolution of a “Reasonableness” Standard

- **In a “litigation free” atmosphere, if the company has created and implemented a clearly defined and reasonable record retention plan that identifies those business-critical records that should be kept for legal, business or regulatory reasons and has set appropriate retention periods, then information not meeting the retention guidelines can be destroyed**
 - *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111-12 (8th Cir. 1988).

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Arthur Andersen LLP v. United States, **544 U.S. 696 (2005)**

- **Validate a corporate retention/destruction policy**
 - “legitimate consequence of the policy is that relevant information may be kept out of the hands of adverse parties”.

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Rambus

- ***Rambus, Inc. v. Infineon Techs. AG,*** 220 F.R.D. 264 (E.D. Va. 2004)
- ***Hynix Semiconductor Inc. v. Rambus, Inc.,*** 2006 WL 565893 (N.D. Cal. Jan. 5, 2006)

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Rambus

- Instituted document retention program at the same time it was doing strategic planning
- Annual “Shred Day” – follow retention policy guidelines
- Approximately 2 million pages destroyed



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Rambus

- Strategic Planning Strategy
- Protect its portfolio of patents, even if that meant filing lawsuits against certain manufacturers



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Rambus

- **Company admitted when it instituted its document retention [destruction] policy, there were discovery-related concerns.**

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Rambus

- **Company executives felt that if the Company was ever asked to produce information from the thousands of backup tapes the Company had, that it would be “beyond . . . human endurance” to figure out what was on the tapes and that they would have to review all the information contained on the tapes, which would require vast resources.**
- **Rambus contended that it adopted its document retention policy for wholly legitimate reasons (reducing search and review costs), and not for the purpose of eliminating potentially damaging documents.**

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Different States – Different Views

- **Virginia Court – Spoliation**
 - Company anticipated litigation when it instituted its document retention program
- **California Court – No spoliation**
 - Company included litigation as part of its licensing strategy, but the institution of litigation was not “reasonably probable” – the path to litigation was neither clear nor immediate “because of certain contingencies”

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Lesson Learned from Rambus?

- ***Lewy v. Remington* still viable in “litigation free” environment**
- **Adoption and implementation of a content neutral document retention policy possible?**
- **Company experience with prior types of litigation?**
- **Industry experience comes into play?**

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Translation...

- **Better way to say that:**
 - “purpose of the policy is to effectively and efficiently manage the company’s resources such that the company retains only the business-critical information it needs to meet business, legal and regulatory requirements”.
- **Think globally about your records management policies.**

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- **What Are the Courts saying about Best Practices for Retention Programs?**



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***Phoenix Four, Inc. v. Strategic Residential Corp.*, 2006
U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006)**

- **Computer technician discovered dormant partitioned hard drive that was not accessible to computer work stations**
- **25 GB of information found**
- **Court found that counsel for Strategic failed to undertake methodical survey of Strategic's sources of information**
- **What does this have to do with a records retention program?**
- **Should have known where to look?**

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***Qualcomm Inc. v. Broadcom Corp.*, 2008 WL
66932 (S.D. Cal. Jan. 7, 2008)**

- **Judge ordered Qualcomm to pay \$8.6 million in sanctions and ordered six of its outside counsel to the State Bar for possible ethical violations.**
- **CREDO**

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**Lorraine v. Markel American Ins. Co., 2007
WL 1300739 (D. Md. May 4, 2007)**

- Insurance contract dispute
- Plaintiffs and defendants file motions for summary judgment supported by unauthenticated and therefore inadmissible emails
- Court dismissed cross motions because neither party to this dispute complied with requirements of Rule 56 that they support their motion with admissible evidence
- What does this have to do with record retention programs?

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**Columbia Pictures Indus. V. Bunnell, 2007 U.S.
Dist. LEXIS 63620 (C.D. Cal Aug. 24, 2007)**

- Plaintiffs asked for discovery requiring website operators to preserve the “server data log” which would show the Internet Protocol (IP) addresses of the web site visitors and what they requested
- Data would be derived from the random access memory (RAM) of the defendant’s web servers in the United states and the Netherlands
- Defendant objected – data was “ephemeral”, not ordinarily saved, routinely overwritten
- Court said that RAM is ESI and capable of being preserved [even if it was not part of defendant’s records management program]

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Healthcare Advocates, Inc. v. Harding, Earley, Folmer & Frailey, 2007 U.S. Dist. LEXIS 52544 (E.D. Pa. July 20, 2007)

- **Plaintiff sued law firm claiming that it had improperly obtained outdated pages from plaintiff's website; failed to preserve the web pages among the law firm's "temporary internet cache files"**
- **Court found that defendant did not act affirmatively or culpably in allowing the temporary cache files to be deleted or overwritten in the ordinary course of computer system operations**

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Doe v. Norwalk Community College, 2007 WL 2066497 (D. Conn. July 16, 2007)

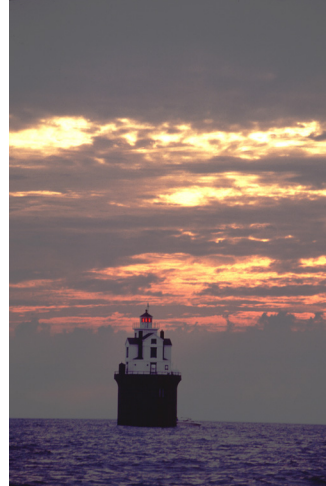
- **Sexual assault case**
- **Plaintiff moved to compel inspection of certain electronic records; granted**
- **Found hard drives of key witnesses were scrubbed or completely wiped of data**
- **Defendant attempted to invoke Rule 37(f) "safe harbor"**
 - Good faith routine operation of information system?
 - How did system work?
 - How did Company store records in ordinary course?
 - Records retention program

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So...

**.....what
are
the
“BEST PRACTICES”?**



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WHERE SHOULD WE LOOK?

WHAT ABOUT DISNEYLAND.....

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Mr. Brady is a Partner at Connolly, Bove, Lodge & Hutz LLP. The analysis, conclusions and/or opinions expressed in this article are the author's own and do not necessarily reflect the position of Counsel to Connolly, Bove, Lodge & Hutz LLP or the opinions of its clients. The views expressed herein are solely those of the author.