

# To Shred or Not to Shred: Document Retention Policies and Spoliation Issues in a Digital Age

presented by

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# Evidence Now Comes from All Kinds of Sources

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# Increasing Amount of Electronic Data

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## Emails

The number of emails sent annually:

2009

**90 trillion**

2010

**107 trillion**

Average number of email messages per day:

**247 billion**

**294 billion**

The number of email users worldwide:

**1.4 billion**

**1.88 billion**

## Social media

The number of blogs on the Internet:

**126 million**

**152 million**

People on Facebook:

**350 million**

**600 million**

## Images

Photos hosted by Flickr:

**4 billion**

**5 billion**

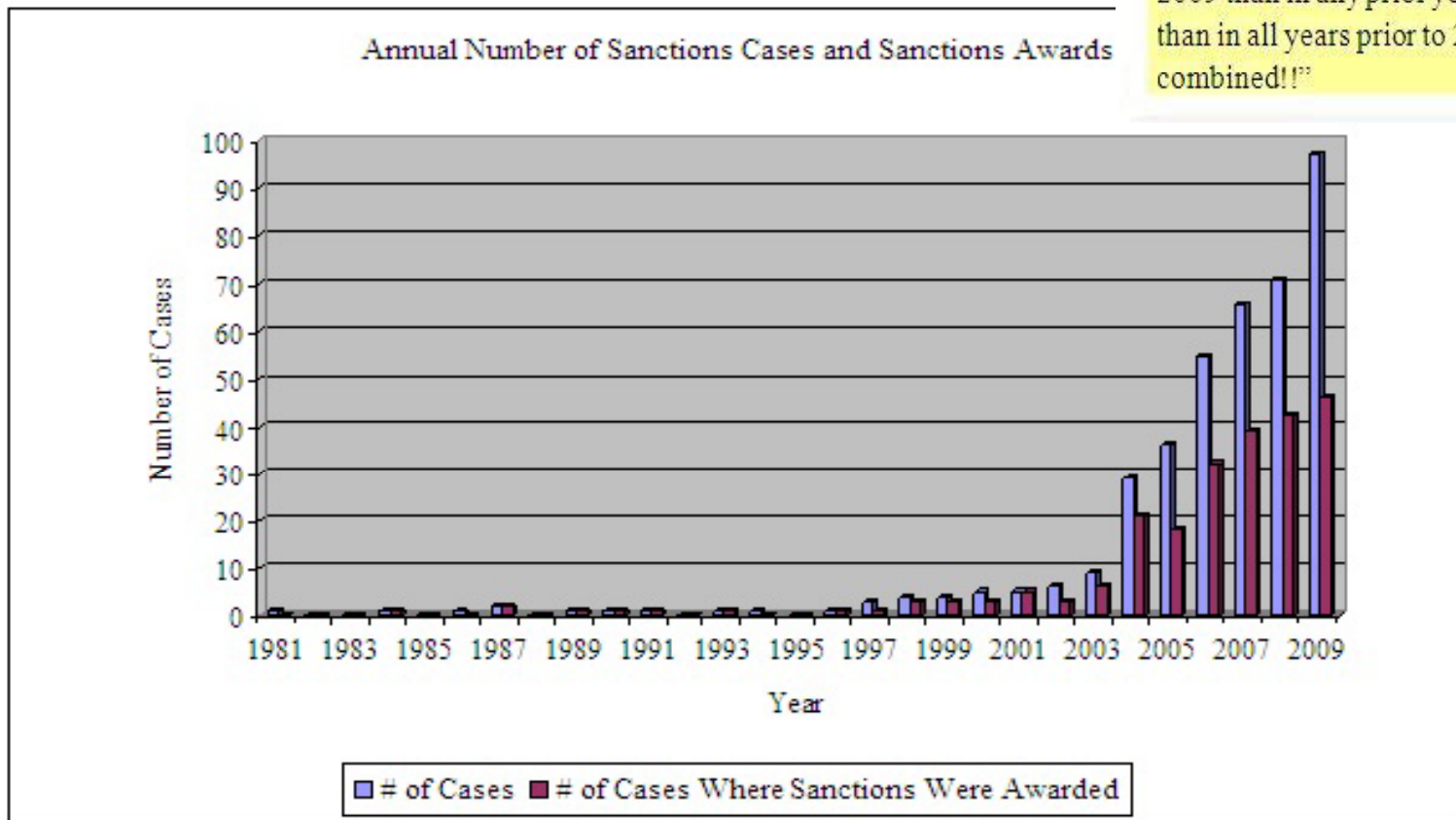
Photos uploaded each month to Facebook:

**2.5 billion**

**3+ billion**

# Spoliation Sanctions on the Rise

“There were more e-discovery sanction cases (97) and more e-discovery sanction awards (46) in 2009 than in any prior year – more than in all years prior to 2005 combined!!”



# The Need for a Social Media Policy

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Purposes of a social media policy include:

- 1) Educate your workforce on the various types of social media outlets
- 2) Determine how social media can be used to further your company's business interests
- 3) Establish guidelines for using social media consistent with your company's core values and/or code of conduct



# The Need for a Document Retention Policy

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- Maintain necessary documents for business use
- Preserve and protect critical records
- Maintain legal compliance
- Minimize potential spoliation risks in the context of litigation
- Control and manage the costs of both record retention and record destruction
- Ensure consistent application of both record retention and record destruction

# By the numbers...

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- **Retention & Archival**
  - Maintain necessary documents for business use;
  - 79% of companies in the U.S. have a document retention policy
- **Legal Hold**
  - 53% of companies have a mechanism in place to suspend their organization's document retention policy
  - Almost one quarter (24%) of companies do not possess a legal hold tool
- **Confidence & Defensibility**
  - 54% of companies believe that their ESI discovery strategy for responding to litigation or regulatory matters is repeatable and defensible.
  - IT (91%) is more confident than legal (73%) in the defensibility of their archiving platform
- **ESI Discovery**
  - 52% of companies in the US have an ESI strategy for responding to litigation or investigatory matters
- **Testing & Repeatability**
  - 38% of respondents have tested their policies
  - 45% of respondents do not know if their policies have been tested
- **Updates & Follow-Up**
  - 55% of companies either have not updated policies at all or do not know if updates have occurred

Figures according to: [http://www.krollontrack.com/library/CMSWire\\_MarisaPeacock\\_100410.pdf](http://www.krollontrack.com/library/CMSWire_MarisaPeacock_100410.pdf)

# Business Considerations

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- Contractual obligations with customers or suppliers
- Keep the information necessary to run the business
- Delete the “unnecessary” information
- Consider storage options
  - account for every format of record
  - account for cost of storage
  - account for cost of search and retrieval

# Legal Considerations when Drafting an ESI Policy

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- Sarbanes Oxley
- Health Information Privacy Act
- Health Insurance Portability and Accountability Act
- OSHA
- Litigation history
- Average retention period ranges from 3 to 7 years

# Data Retention Policies Should

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- State the purpose of the policy
- Define who is affected by the policy
- Identify what type of data and electronic systems are covered by the policy
- Define key terms (especially legal and technical terminology)
- Describe the requirements in detail from the legal, business and personal perspectives
- Outline the procedures for ensuring data is properly retained
- Outline the procedures for ensuring data is properly destroyed

# Data Retention Policies Should

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- Clearly document the litigation exception process and how to respond to discovery requests
- List the responsibilities of those involved in data retention activities
- Build a table showing the information type and the corresponding retention period
- Document the specific duties of a central/corporate data retention team if one exists
- Include an appendix for additional reference information, as needed

# Types of Data and Records to be Covered

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- Electronically stored information includes:
  - emails
  - text messages
  - other business related information generated, stored, or transmitted via a personal computer, laptop, PDA, cellular phone, or other electronic voice and data communications devices
- Electronically stored information also includes “embedded data” or “embedded edits” and “meta-data”

# Electronic Information Systems

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## What Companies Need to Know:

- The type of information that is created by their computer systems
- How that information is stored
- Where the information is stored
- How long the information is stored
- How the information is accessed
- How the information is overwritten, deleted, and destroyed during the normal operation of the system



# Measures to Take when Drafting an ESI Policy

- Inventory all electronic storage systems and gain an understanding of where information is located and how it is stored and generated on the various systems
- Implement retention and destruction policies for electronic records. Implement procedures for placing a “litigation hold” on any electronic records that may be relevant to litigation and discoverable in litigation including notification procedures to ensure that ESI is not overwritten or deleted (commonly called “Preservation Notices”)



# Measures to Take when Drafting an ESI Policy

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- A Preservation Notice must be sent out to all employees who may have or have access to relevant information
- Once a Preservation Notice is issued, document destruction must cease for all classes of documents that may contain relevant information
- Educate and train employees on policies relating to electronic records and compliance with Preservation Notices
- Involve IT personnel in designing policies and training employees to ensure that IT personnel understand the objectives and consequences

# Fed. R. Civ. P. 34 - Comments

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- The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced
- The form of production is more important to the exchange of electronically stored information than of hard-copy materials
- Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information.
- The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information

## Fed. R. Civ. P. 34 – Comments (cont'd)

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- A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form
- Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information
- If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature

## Fed. R. Civ. P. 26(b)(2)(B)

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- A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden
- Examples of data not reasonably accessible include:
  - backup tapes intended for disaster recovery purposes
  - legacy data that remains from obsolete systems and is unintelligible on successor systems
  - data that was deleted but remains in fragmented form
  - databases designed to create particular information in certain ways and that cannot readily create other types or forms of information

## Tex. R. Civ. P. 196.4

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- A requesting party must specifically identify the requested information and also specify the form in which that data should be produced
- Unless otherwise ordered, the responding party need only produce data that is reasonably available in the ordinary course of business in reasonably usable form
- For any electronic data requiring extraordinary steps for retrieval or production, the court should enter a cost-shifting order directing the requesting party to pay the reasonable expenses

# Spoliation - Definition

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Spoliation - the improper destruction of evidence relevant to a case.

*“Intentional spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator.”*

However, the presumption may be rebutted if the alleged spoliator shows that the “evidence in question was not destroyed with fraudulent intent or purpose.”

## Spoliation - Purpose

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The purpose of the spoliation rule is to prevent a party from subverting the “discovery process and the fair administration of justice simply by destroying evidence of an adverse claim.”

Once a party is aware of a potential claim, that party incurs a “duty to exercise reasonable care to preserve information relevant to that claim.”

If a party breaches that duty by intentionally or negligently failing to preserve relevant evidence, that party may be held accountable for its loss.” Such accountability may be achieved through sanctions or a spoliation instruction.

# Spoliation – Court Considerations

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- 1) Whether a duty existed to preserve the evidence
- 2) Whether the evidence was negligently or intentionally spoliated
- 3) Whether the spoliation prejudiced the other party's case



## Whether a Duty Existed

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A party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession will be material and relevant to that claim.

The Texas Supreme Court has made clear that *actual notice* of the potential for litigation is not required; instead, “*common sense* dictates that a party may reasonably anticipate suit being filed....before the plaintiff manifests an intent to sue.”

# Spoliation - Evidence

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Whether Evidence was negligently or intentionally spoliated?

- A spoliator can defend against an allegation of negligent or intentional destruction of evidence by providing other explanations for the destruction (such as the destruction was beyond the spoliator's control or done in the ordinary course of business)
- BUT, if the duty to preserve evidence arises before the destruction, such defenses will not excuse the spoliation

# Spoliation - Prejudice

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Whether the spoliation prejudiced the other party's case? Texas courts analyze a variety of issues, including:

- The relevancy of the missing evidence
- The harmful effect of the evidence
- The availability of other evidence to take the place of the missing information”

The most important factor for a court to consider is “the destroyed evidence's relevancy,” but a court should also consider “whether the destroyed evidence was cumulative of other competent evidence that a party can use in place of the destroyed evidence, and whether the destroyed evidence supports key issues in the case.”

## Spoliation – Prejudice (cont'd)

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The mere fact that evidence was destroyed is some evidence of its relevance, and when dealing with *intentional* destruction of evidence, a court should find the destroyed evidence was relevant and harmful to the spoliator's case absent evidence to the contrary.

If the trial court finds the existence of a duty, a breach and a prejudice to the other party, it must then “consider what remedy is warranted by the circumstances of the case” and, in doing so, is “accorded broad discretion.”

In sum, a party is entitled to a remedy when the spoliation hinders its ability to present its case or defense.

# What a Requesting Party Must Show

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- 1) It requested the missing evidence and pursued a court order to compel its production
- 2) The missing evidence is relevant
- 3) There is no other evidence available to replace the missing evidence
- 4) The missing evidence supports key issues in the case

# What is the Appropriate Sanction?

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- The court has broad discretion in determining the appropriate sanction or in issuing a spoliation presumption instruction
- The most severe sanction—dismissing the action or rendering a default judgment against the spoliator—is warranted when the spoliator’s conduct was egregious, the prejudice to the non-spoliator was great, and imposing a lesser sanction would be ineffective to cure the prejudice

# Form of a Spoliation Instruction

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A spoliation instruction can be given in one of two forms, depending on the severity of prejudice resulting from the destruction:

- 1) a rebuttable presumption that the spoliator has either negligently or intentionally destroyed evidence and, therefore, the jury should presume the destroyed evidence was unfavorable to the spoliator
- 2) an adverse presumption that the evidence would have been unfavorable to the spoliator

# Spoliation of Evidence Did Occur

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## *Offshore Pipelines, Inc. v. Schooley*

- Edward Schooley (“Schooley”) sued Offshore Pipelines, Inc. and OPI International, Inc. (“Offshore”) for personal injuries allegedly sustained while employed as an electrician onboard an Offshore vessel
- Specifically, Schooley alleged that he developed an intestinal tumor due to the vessel’s contaminated drinking water
- Schooley sought Offshore’s medical logs for the time period in issue
- In response, Offshore’s corporate officer testified that although he had not instructed anyone to destroy the logs, he had been unable to locate them and that “many records” had been removed from the vessel during a subsequent trip
- Further, the corporate officer testified that he did not think it “curious or unusual” that Offshore had retained all of the vessel’s logs except the medical log covering the period of time in question

## Spoliation of Evidence Did Occur (cont'd)

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### *Offshore Pipelines, Inc. v. Schooley*

The trial court included the following spoliation instruction:

“If a party fails to produce evidence which is under its control and reasonably available to it and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.”

# Spoliation of Evidence Did Not Occur

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## ***Ordonez v. M.W. McCurdy & Co., Inc.***

- A van driven by Robert Ordonez (“Ordonez”) was struck by a truck driven by Arthur Johnson (“Johnson”), an employee of M.W. McCurdy & Company (“McCurdy”)
- As a result, Ordonez filed suit, alleging that Johnson was negligent and negligent per se and that McCurdy was vicariously liable for Johnson's conduct
- Ordonez claimed that McCurdy intentionally destroyed logbooks documenting hours driven and off-duty time, as required by federal regulations
- A McCurdy representative testified that logbooks only were only retained for six months according to standard company procedures. The representative further testified that the relevant logbooks were destroyed pursuant to this procedure
- Ordonez elicited testimony that the relevant logbooks were destroyed even though McCurdy had *possibly* received notice of Ordonez’s intent to file a claim related to the wreck

# Spoliation of Evidence Did Not Occur (cont'd)

## *Ordonez v. M.W. McCurdy & Co., Inc.*

- Ordonez argued this testimony was “unequivocal evidence” that McCurdy intentionally destroyed the logbooks
- The First Court of Appeals disagreed, noting that the representative “merely testified the log book was ‘thrown away’ and that it was ‘possible’ that McCurdy received a notice letter from Ordonez soon after the accident”
- This testimony, coupled with the earlier testimony that all logbooks are routinely disposed of after six months, showed “only that the logbooks were thrown away pursuant to McCurdy's normal business practice of keeping such logs for only six months”
- As a result, the First Court of Appeals affirmed the trial court’s finding that Ordonez was not entitled to a spoliation instruction because nothing indicated the evidence was destroyed “for the purpose of concealing”

# Questions?

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