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## Commentary

# Electronic Record Retention Guidelines: A Tough Nut To Crack

by David Winkler

What electronic records to keep—and for how long?

The last response to these questions that an impatient corporate squirrel wants to hear is: "it depends." But that's the honest answer.

Of course, I'm not talking about squirrels running around in disposable diapers, but rather pointing out the clear distinction between paper records and electronic records. Paper document retention policies are clear, varying from three years for this type of document, seven years for that type, indefinite for other types.

Electronic files are much more complex. Numerous industry organizations, federal agencies, state laws and so on govern this topic. So, it depends on a number of factors, including: the industry in which you do business, the nature of your business, your clients and their policies, the state(s) in which you do business, the type of product or service that you provide, and so on.

To complicate matters further, the 2006 Federal Rules for Civil Procedures (FRCP), by which court procedures for civil suits are governed, were recently amended. The amendments address five areas of note: (1) Early Attention; (2) Accessibility; (3) Form of Production; (4) Claims of Privilege; and (5) Sanctions. Each of these areas deal with specific topics such as:

- Authorize discovery of "electronically stored information," (ESI).

- Limit scope of discovery to ESI sources that are "reasonably accessible" in terms of burden and cost, unless good cause for broader, court ordered discovery.
- Require early assessment and discussion of ESI discovery issues.
- Require ESI to be produced in native format unless otherwise requested, agreed or ordered.

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- Create safe harbor from FRCP sanctions if ESI is lost because of "the routine, good faith operation of an electronic information system."
- Apply similar ESI rules to the federal subpoena process.

A recent survey indicated that 93% of all information generated today is electronic. For instance, we send more than 1.5 billion emails every business day. To make matters worse, we are storing more and more of this information—and 30% of it is never printed. The most common types of

electronic records are created by telephone and email systems, as well as instant messaging (IM). Devices on which these data are accumulated are the hard drives of our PCs, server-based disk drives, larger network storage devices, called SANs, and document imaging and storage systems.

### A Dependable Solution

A good policy for electronic record retention in one business may not be the best for another. Each business should develop a unique retention policy and plan of action for enforcing that policy. Organizations should seek dependable professionals who can provide independent

advice and assistance in developing and enforcing electronic record retention policies.

What is the most appropriate policy for you? You can call me nuts, but you know—it depends!

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