

**For NCC**

**March 20,  
2014**

# ***Electronic Records Retention – Preserve or Perish; Destroy or Drown***



**THESE MATERIALS ARE MEANT TO ASSIST IN A GENERAL  
UNDERSTANDING OF CURRENT LAW AND PRACTICES.**

**THEY ARE NOT TO BE REGARDED AS LEGAL ADVICE.**

**THOSE WITH PARTICULAR QUESTIONS  
SHOULD SEEK ADVICE OF COUNSEL.**

***Robert D. Brownstone, Esq.***

***Webinar***

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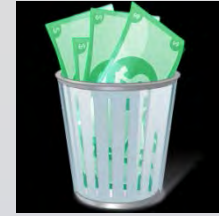
**Fenwick**  
FENWICK & WEST LLP

# Outline/ Agenda



- ***INTRODUCTION***
- **I. Risks of Over-Saving**
- **II. Risks of Under-Saving**
- **III. Implementing a Compliant Program**
- **IV. Going Paperless**
- ***CONCLUSION***

# INTRODUCTION – The Big Picture



## ■ THE THREE BUCKETS:

### ● 1) MUST KEEP – LEGAL NEEDS

- statutes and regulations
- litigation-hold

### ● 2) WANT TO KEEP – BUSINESS NEEDS

### ● 3) DISPOSE/DELETE – EVERYTHING ELSE

- **Many resources linked off** slides 40-51 (.pdf pp. 43-54) of Brownstone, *Employee-Related Records – Retention, Management & Destruction*, NCC (Feb. 2, 2010) <[constitutionconferences.com/RE/9W-DL#page=43](http://constitutionconferences.com/RE/9W-DL#page=43)>

# I. Risks of Over-Saving – Inefficiencies Day-to-Day



## ■ Over-Saving Costs:

- retrieval capability
- storage fees
- eDiscovery collections/productions (“triple whammy” of costs)
- “smoking gun” content

■ ***See also this [3/6/14 LTN Article](#)***



## II. Risks of Under-Saving

### A. "Must Keep"

#### ■ Misc. Statutory/Regulatory Periods

- Examples of Generic Ones:

- **Safety Statutes/Regs., e.g.:**

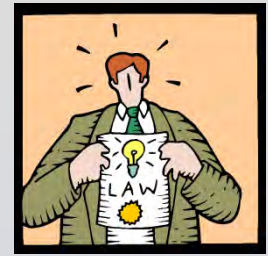
- Federal: *OSHA Injury and Illness Recordkeeping:*

- » *Recording & Reporting Occupational Injuries & Illnesses*

- » *Proposed new eSubmission rule*  
(2/6/14) (if > 250 employees)

- State Ex. – *Cal/OSHA, incl. Injury and Illness Prevention Program eTool*

## II (A). Retention Rules – Must Keep . . . . (c't'd)



- **Statutes/Regs. Generic Exs. (c't'd)**
  - **Tax**
  - **Statutes of Limitation, e.g.:**
    - **breach of contract**
    - **unfair competition laws (UCL), in, e.g., Cal., Mass. N.Y. & Texas**

## II (A). Retention Rules – Must Keep . . . . (c't'd)



- **Statutory/Regulatory Generic Exs. (c't'd)**
  - **EMP/HR – could use 5 year “big bucket”**
    - **MANY individual categories, e.g., 1-9**
      - Jaclyn Jaeger, *Immigration Compliance Audits Hit Record-High Levels*, Compliance Week (11/19/13)
      - *Ketchikan Drywall Services v. ICE*, 725 F.3d 1103 (9th Cir. 8/6/13) (letting stand ALJ’s Law Judge’s decision upholding ICE’s finding of violation of Immigration and Nationality Act and resulting civil penalty)
      - e-Verify reauthorized until 9-30-15 by S. 3245, Pub. Law No. 112-76, 126 Stat. 1325 (9/30/12)
      - Resources at Slides 9-10 of prior slide deck



## II (A). Must Keep *(c't'd)* – Personnel “Files”

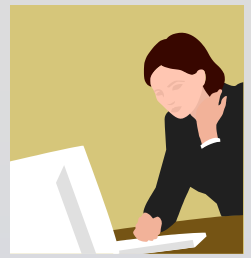
- Under state law (ex: Cal.), each employee may have right to review his or her personnel “file” and/or “records”
- Modern substantive concept generally broader than just information in employee's “official” personnel file
- Electronically stored information (ESI) can be in many different formats and locations





## II (A). Must Keep *(c't'd)* – Personnel “Files” *(c't'd)*

- **Employee’s inspection right not open-ended**
- **Neither is supervisor’s/manager’s**
- **Whether ESI or paper, each “file” has 3 slices:**
  - **1) Information Employee HAS Right to Inspect/Access**
    - a) General Records/Info. in Main “File”
    - b) Private-Info./Records in Separate “File”
  - **2) Information Employee HAS *NO* Right to Inspect/Access**
  - **3) Private Information Subject to Restricted Employer Access (need-to-know) = 1(b)**



## II (A). *Some Restricted Access Categories*

- **PRIVATE (employee YES; employer personnel: SOME)**
  - medical info./records
  - information re: wage attachment or garnishment for child support
  - background check results showing credit history info. that didn't disqualify applicant from emp.
- **RESTRICTED (employee: NO; employer personnel: YES)**
  - info./records re: investigation of possible crime (*but may be different for public entity employers*)

## II (A). Retention Rules – Must Keep . . . . (c't'd)



- **“Litigation-Hold” (Preservation) Duties**
  - **State and Federal Obstruction Crimes**
    - **Fed. obstruction-of-justice crimes post-passage of Sarbanes-Oxley (SOX) in 2002**
      - **See two articles at Slide 10 [of prior slide deck](#)**
  - **Attorney Ethics Rules**
  - **Case-Law Preservation (Destruction-Suspension) Obligation . . .**
    - **See four articles at Slide 11 [of prior slide deck](#)**
    - **For sample plan: click [here](#)**

## II (A). Destruction “Safe Harbor” – How Safe?



- FRCP 37(e): “. . . a court may not impose sanctions . . . for failing to provide electronically stored information lost as a result of the routine, good- faith operation of **an** electronic information system.”
- So, to extent data storage outsourced, sync inside and outside deletion schedules
  - See, e.g., Tomlinson v. El Paso Corp., 245 F.R.D. 474 (D. Colo. 8/31/07) (compelling production – under FRCP 26 (a)(1)(B) – re: third-party ERISA record-keeping system)

## II (A). Destruction “Safe Harbor” – How Safe?



- Possible FRCP 37 Amendment . . .
- Instead of just a safe-harbor *defense*, might become an affirmative standard requiring bad faith as sanctions condition
- Uniform standard across circuits maybe
  - Proposed FRCP Amendments [HERE](#), at .pdf p. 259, et seq. (8/15/13) . . .
  - Proposed *new* FRCP 37 addressed there, at:
    - [.pdf pp. 270-75](#); and [.pdf pp. 312-28](#)
  - See also Steven M. Sellers, [Committee weighs public input on federal rules proposals](#), Am. Ass'n for Justice (11/21/13)

## II (A). Destruction “Safe Harbor” – How Safe?



- But for now, the spoliation sanctions decisions just keep on coming . . .
  - *Sekisui American Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. 8/15/13)
    - Sara Begley and John McDonald, *Deletion of Former Owner's Email Account More Than a Year Before Litigation Results in Adverse Inference*, Forbes (8/16/13)



## II (A). How Safe? *(c't'd)*

- **Litigation Hold Protocol re:**
  - **who:**
    - decides whether trigger occurred
    - memorializes decision to (not) institute hold
    - issues hold notice
    - manages hold
  - **what:**
    - suspensions might be routinely considered
    - form notice(s) might typically contain

## II (A). How Safe? *(c't'd)*



- **First three EIM questions (outside) litigation counsel should ask his/her client:**
  - **Retention policy's (if any) contents, including LIT-hold segment = ?**
  - **Policy actually followed in trenches = ?**
  - **Since the time the question of LIT-hold arose, what has been done = ?**

*See **SHORT** video [here](#).*

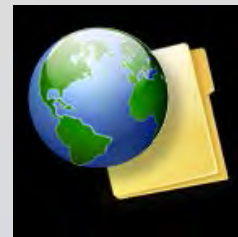




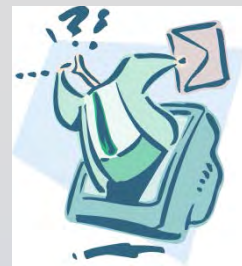
## II (A). “Safe Harbor” – Preservation Challenges

- **Overseas ESI** (*Slides 25-27 below*)
- **“The Cloud”** (*Slide 28 below*)
- **Smartphones/Tablets (incl. BYOD)**
  - Devices portals to huge universe of info.
- **Web 2.0/UGC/Social-media pages:**
  - Within organizations (wikis, SharePoint, etc.)
  - On web on entity-sponsored sites/pages
  - By employees on own personal sites/pages
    - **case-law bibliography = [click here](#)** [if you have viewing issues in IE, download copy or use Firefox or Chrome]

## II. Risks of Under-Saving *(c't'd)* – B. “Want to Keep”



- **Business Needs, including . . .**
- **Generic records, e.g.:**
  - **Corporate/historical**
  - **Intellectual Property (IP)**
- **Particular to industry and/or to given company and/or department**



## II (B). Risks of Under-Saving *(c't'd)*

- Why is **non-LIT-hold** under-saving arguably less risky?
  - For a non-highly-regulated company, failure to comply with legally-imposed retention obligation NOT necessarily spoliation *per se*
    - *Sarmiento v. Montclair State Univ.*, 513 F. Supp. 2d 72 (D.N.J. 5/9/07)
- When no clear legally-imposed rule, then organization can create – and meet – its own quantifiable standards



## II (B). Under-Saving Counterpoint *(c't'd)*

- “Less is more”? . . .
- Exs. of companies shielded from spoliation sanctions in some discrimination cases:
  - *Patterson v. Goodyear Tire & Rubber Co.*, 2009 WL 1107740 (D. Kan. 4/23/09) (routine 12 month deletion of attendance logs)
  - *Gipetti v. United Parcel Service Inc.*, 2008 WL 3264483 (N.D. Cal. 8/6/08) (routinized 37-day destruction approach re: employees' driving records)
- ***See also Pradaxa* decision at Slide 44**

# III. Implementing Compliant PROGRAM – A. Some Keys



- **1. Avoid Compliance Gap**
- **KUMBAYA?! Well-thought-out policy language on which multiple constituencies have weighed in . .**



- **Compliance's "3 E's" = Establish/Educate/Enforce**
  - Nancy Flynn, ePolicy Inst., as cited at p. 3 of "[Email is Exhibit A](#)"

# III (A). Implementing a PROGRAM *(c't'd)*



## ■ 2. Prioritize

- Phased-in/Stages?
  - Past/Present/Future
- Resources and Culture

## ■ 3. EIM 101

- Know/learn what have & where
- Intersecting lines of:
  - types of content
  - repositories/vats (esp. risky ones)

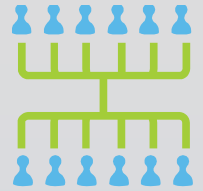
# III (A) (3). Implementation Keys – EIM 101 *(c't'd)*



## ■ Intersecting lines *(c't'd)*

Content							
↓	Vats	→	Email	Drives	DMS	Cloud	...
HR							
Safety							
Tax							
...							

# III (A) (3). Implementation Keys – EIM 101 *(c't'd)*



SAMPLE_Repositories_Lists_--_Paper_and_Electronic.xls				
	A	B	C	D
1	<b>PDQ CO. REPOSITORIES 9/17/09</b>			
2	<b>Worksheet 1 = Paper Worksheet 2 = Electronic</b>			
3				
4	<b>SAMPLE ANONYMIZED EXCERPT</b>			
5				
6	<b>Repository</b>	<b>ABC</b>	<b>Owner(s)</b>	<b>Source(s) for this info.</b>
7		<b>Dep't/3P</b>	<b>Individual</b>	
8	A/P Data	XYZ A/P Service		SOX Internal-Controls Flowchart, at p. 4
9	Back-up Tapes -- on-site	IT	Doe, John	IT Systems Protocol, at p. 9
10	Back-up Tapes -- off-site	XYZ Storage Co., IT	Austen, Jane	IT Systems Protocol, at p. 10
11	Blackberry Server (BES) and Blackberries	IT	Johnson, Samuel	IT Systems Protocol, at p. 8
12	.....			
13	E-mail -- Archive -- Symantec Enterprise Vault	IT	Shakespeare, William	IT Systems Protocol, at p. 7
14	E-mail -- Live -- Outlook/Exchange	IT	Bacon, Francis	IT Systems Protocol, at p. 7
15	.....			
16	Network Drive Partition -- Accounting	Accounting & Finance	Numbers, Lovethose	Retention Program; Departmental Protocol, at p. 2
17	Network Drive Partition -- HR	Human Resources	Nurturer, Caring	Personnel Files Checklist, at p. 2
18	.....			
19	SharePoint Platform	Knowledge Management	Itguy, KM	IT Systems Protocol, at p. 11
20	.....			
21	Website -- External	Marketing	Riter, Copy	IT Systems Protocol, at p. 11





# III (A). Implementation – Some Keys *(c't'd)*

- **3. EIM 101** *(c't'd)*
  - Partial Checklist of ESI Landscape/Locations
    - ***ADD SMARTPHONES, including BYOD,*** to list at Slide 36 of prior [slide deck](#)
    - Re: “Data Maps”: see Slide [34 of that deck](#)
- **4. Cross-Border Data**
  - ESI stored overseas, esp. in EU . . .
  - EU, “[Directive 95/46/EC](#) of the European Parliament and of the Council”
    - “Processing” of “Personal Data”
    - “Transfer” of “Personal Data”

# III (A) (4). Implementation Keys – EU *(c't'd)*



- **See also individual EU countries' rules**
- **International Issues** re: day-to-day data flow from EU (or other) countries to U.S.:
  - 1) systems' configuration;
  - 2) Data Protection Authorities (DPA's); and
  - 3) Safe Harbor?
- **TO LEARN MORE:** [this 5/18/12 slide deck](#); *and* [this video of a live 10/24/12 panel discussion](#)

# III (A) (4). Implementation Keys – EU *(c't'd)*

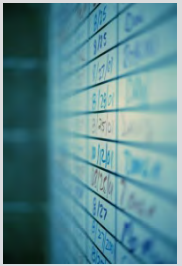


- Revised EU Directive “adopted” January 2012 and targeting 2015 implementation
- For home page, click [here](#)
- Big developments:
  - “Civil Liberties MEPs pave the way for stronger data protection in the EU” (10/21/13)
  - “Q&A on EU data protection reform” (3/4/14)
  - “European Parliament: Suspend Safe Harbor, Data Sharing with United States” (3/12/14)



# III (A). Implementation – Some Keys *(c't'd)*

- **5. Address “The Cloud”**
  - Centralized vs. ad hoc in, e.g., Dropbox
  - Relative bargaining power?
  - Sync schedules if you can [FRCP 37(e)], as to:
    - active/ live data?
    - backed-up data?
  - Possession/custody/control? Severability?
  - *For some decisions, see slide 24-27 [here](#)*
  - *See also this [3/7/14 law360 article](#)*



# III (A). Implementation – Some Keys *(c't'd)*

- **6. Timing of Roll-out**
  - **Memorialize regime-change details**
    - written dialogue/reasons
    - notification
    - training
  - **Address LIT hold situations**
- **7. Pick your repository targets**
  - **See Section III (B) immediately below . . .**



# III. Implementation –

## B. Key Targets

- 1. Voicemail
- 2. Locally stored data
- 3. Paper – see § IV below
- 4. Email – Internally Hosted (Outlook/Exchange) vs. Cloud-Hosted (Gmail) re:
  - a. Age-based “purge” rules
    - Deleted Items (Trash) vs. other items not sorted and/or not in immune location?
    - Outlook – centrally set admin. rules
    - Gmail – Vault add-on to Google Apps (“[d]efine retention policies . . . automatically applied to your email and chat messages”)

# III (B) (4). Email – Target # 4 *(c't'd)*



- **b. Mailbox-size-based purge rules**
  - **Outlook – centrally set admin. rules**
  - **Gmail**
    - **Install and configure local cache ability via Google Apps Sync for Microsoft Outlook**
    - **Set local copy's maximum storage size at, for example, one (1) Gigabyte (Gb)**
    - **Maintain maximum by the local Personal Storage File" (.pst) archive's holding of copies of emails on a FIFO basis**



## III (B) (4). Email – Target # 4 *(c't'd)*

### ■ c. Personal (individual) “archives” \*

\* See Brownstone [Translating for Technologists, Lawyers & Earthlings](#), IT Law Today (8/6/13)

#### • Outlook:

- block .pst creation or (if regulated company?), set location(s)
- use scanning/searching software
  - [Attender Utilities for Exchange®](#) (Sherpa)
  - [PST Enterprise](#) (ReSoft)

#### • Gmail

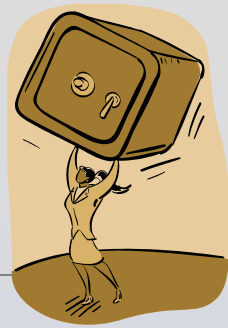
- see above for cap and searching
- see *also* [this 3/14/13 LifeHacker article](#)





## III (B) (4). Email – Target # 4 *(c't'd)*

- **d. Turning off Purges for LIT Hold**
  - Think about same in advance – when setting initial policy parameters
  - In reactive mode, make sure to assess and, where possible, turn off purge selectively or broadly, as apt
  - ***NOTE: reactive “change management” concern will apply to all systems . . .***



## III (B) (4) (d). Email – Lit Hold *(c't'd)*

- Outlook – more granular control now (Exchange Server 2010 & 2013)
- Gmail – Google Apps Vault add-on (“[p]lace legal holds on users as needed [; e]mail and chat messages can't be deleted by users when ... on hold”):
  - “Introduction to Google Apps Vault”
  - “Place litigation holds”



# III (B) (4). Email – Target # 4 *(c't'd)*

- **e. Enterprise-wide Archives**
  - **As can .pst's: sets can be outside of – and/or duplicative of – emails stored in live mailbox(es)**
  - **Potential Benefits**
    - **Reduce live performance load**
    - **Ready searching/surfing for content, which can be critical to incident-response and collections**



# III (B) (4) (e). Email – Enterprise-wide Archives *(c't'd)*

## ■ Potential Benefits *(c't'd)*

- Creation, in effect, of an eDiscovery repository, by enabling searching of:
  - attachments' contents; and
  - across multiple users' mailboxes

*Neither traditionally possible in Exchange*

- Routinized deletion per Policy schedules, incl.:
  - searches for items over x number of months/years
  - automated or manual foldering as to categories

# III (B) (4) (e). Email – Enterprise-wide Archives *(c't'd)*



## ■ Potential Pitfalls:

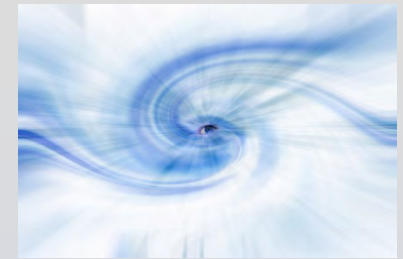
- **“Hotel California” or “Roach Motel” :**
  - Could become giant dumping-ground for old, stale e-mails that never get deleted
- **Not thinking through workflow, which should entail coordination of:**
  - Outlook e-mail “purge(s)”
  - “Vaulting” live e-mail into archive
  - Disposal of non-needed items from archive

# III (B) (4) (e). Email – Enterprise-wide Archives *(c't'd)*



- **Potential Pitfalls *(c't'd)*:**
  - **Not (adequately) educating employees**
  - **If enable users to “restore” at will, make sure archive settings will sweep older e-mails back into the archive**

# III (B) (4). Email – Target # 4 *(c't'd)*



- **f. Journaling and the like**
  - **Exchange . . . “Journaling”**
  - **Akin to misguided use of platforms such as Barracuda, Postini (now transitioned to Google Apps/Vault) and ProofPoint**
  - **Some journaling concerns**
    - **not informing users of deployment– day-to-day OR in reactive/eDisco mode**
    - **over- and/or under- inclusive compared to contents of live boxes & .pst's**
    - **once it's on, when can one turn it off?**



# III (B). Implementation – Key Targets *(c't'd)*

## ■ 5. Back-ups

- a. Introduction
  - “Rule of 3”
  - Tape vs. Disk
  - Fulls vs. Incrementals vs. Differentials
  - Rotation/recycling
- b. True DR/BC vs. “Near-line” Archive
- c. Segregate: E-mail / Financials / Products / HR / All-the-rest





## III (B) (5). Back-ups – Target # 5 *(c't'd)*

- **d. NO = Permanent/Indefinite Retention**
  - Don't keep for too long, esp. if any or all of:
    - Legacy
      - restoration Costs (\$, -ware, people)
      - eDiscovery Concerns, incl. b. & c. above ...
    - Off-site (storage \$)
    - Non-labeled and/or unused for X years

# III (B). Implementation – Key Targets *(c't'd)*

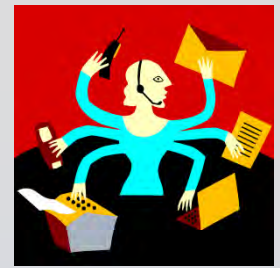


- **6. IM & Video Calling**
  - **a. Company-Sponsored vs. External Platforms**
  - **b. Scope of Permitted Use**
  - **c. Logging Allowed/Used?**
  - **d. If Logging Allowed, Retention-Period = ?**



### III. C. Some Key Related Policies

- **Technology-Acceptable-Use Policy (TAUP) = at least in part a No-Expectation-of-Privacy Policy (NoEEPP)**
  - *See generally* Robert D. Brownstone, [\*eWorkplace Privacy Materials III\*](#), Nat'l. Emp. L. Inst. (NELI) (Feb. 2014)
- **Departing/Terminated Employees**
  - **Separation Policy and IT Checklist**
    - [\*In re Pradaxa Prods. Liab. Litig.\*](#), 2013 WL 5377164 (S.D. Ill. 9/25/13)
- **Destruction Protocols**
- **Social-Media Policy**



## IV. Going Paperless

- Huge efficiencies to be gained
- Federal and States' legal support (and some contrary authorities/vestiges):
  - Brownstone, [Paperless/Retention](#), at Slides 35-36, 38 & 46, NCC (5/9/11)
  - Medical/Health – U.S. HHS:
    - CMS, [Medicare & Medicaid Electronic Health Records \(EHR\) Incentive Programs](#)
    - ONC, [Health IT](#)
  - Tips
    - *Various articles available on request*

# IV. Going Paperless *(c't'd)* – The Three Ghosts



- **PAST. . . Low-Hanging Fruit . . . .**  
Start with old boxes of paper not retrieved or looked at for years AND:



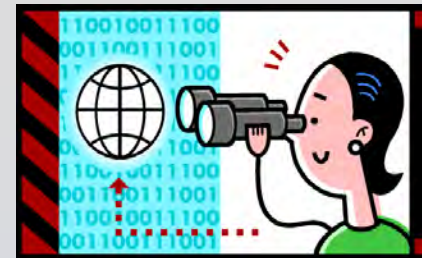
- unlabeled; or
- whose labels/indices reflect no need

- **PRESENT. . . Assess workflow re:**  
all documents *and information*  
(letters, invoices, receipts, etc.)



- created within your organization
- disseminated by your organization

## IV. Going Paperless (c't'd) – The Three Ghosts (c't'd)



- **FUTURE. . .** As to incoming documents *and information*:
  - wherever possible, get buy-in regarding going electronic
  - to extent control not possible, develop – and train on – scanning/ imaging protocol for all incoming paper
  
- **TO LEARN MORE:**
  - [Chrome River](#) (Expense, Invoice, etc.)
  - ReadSoft®, [Document process automation](#)
  - As to eSignatures, see [this bibliography](#)

# Conclusion/ Questions



## ■ Q&A

## ■ Robert D. Brownstone



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