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The Legal Duty to Preserve Electronic Business Records: The New Rules

by William R. Jacobs



The Enron debacle presented a particularly egregious example of document "spoliation," an organized, massive, and deliberate destruction of documents that were highly relevant to inevitable litigation and governmental investigations. But destroying documents, even in less dramatic ways, can pose serious problems and risk, especially electronically stored information. If such documents or records are destroyed, a business litigant could be faced with charges that it destroyed relevant information. Likewise, a party asserting such a claim could allow critical electronic records to become lost and no longer subject to production or examination in the proceedings. The party successfully asserting spoliation could seek discovery sanctions from the court, which could include an adverse determination on critical issues in the case, the imposition of judgment or dismissal, or instructions allowing the jury to draw adverse inferences against the party that allowed or permitted the destruction of documents. Obviously, litigants desire to avoid all of these possible sanctions.

The Federal Rules of Civil Procedure were recently amended to address the topic of discovery of electronic data, records, and communications. Many of these new amendments relate to how discovery of such records can be efficiently managed during the litigation process through means such as discovery management plans. These aspects of the rule changes are important to parties because their personnel will be crucial participants in this planning and preservation process. They also have to ensure that counsel is fully informed as to the operation and architecture of the company's IT system.

Of special relevance and concern is the amendment to the section on "sanctions," which reads in its entirety as follows:

"Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

Unfortunately, this brief paragraph raises more questions than it answers. One key point is that it relates to instances where documents are deleted in the course of routine operations. If deletion decisions are made outside this context, the "safe harbor" protection may not automatically apply. "Exceptional circumstances" is an undefined term that will be subject to future determination on a case-by-case basis.

Another key concept is "good faith." One of many formulations of this concept is "honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry." Since bad faith is difficult to prove, this might seem to be a wide harbor of safety; at least in theory, a party can be negligent but still act in good faith.

Businesses should strive to implement a preservation plan that goes beyond good faith and meets the higher standard of reasonableness. Not only will this create an added degree of protection from discovery sanctions, it will also address possible direct liability for document spoliation, which can provide a basis for civil liability separate from the discovery rules.

General Considerations of a Reasonable Electronic Record Management System

In setting up a record retention system in advance of a lawsuit or notice of a claim, a business can take advantage of a comprehensive and informative analysis prepared by The Sedona Conference. "The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age" may be downloaded at www.thesedonaconference.org. It articulates and expounds upon basic principles and guidelines with an extended discussion and analysis of each. In addition, it cites many relevant court decisions and contains a glossary and discussion of technical concepts.

The Guidelines contain the following overarching principles for an organization considering an electronic record management system:

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Using Mechanic's Liens to Collect Accounts Receivable

by Timothy B. Theissen

Every contractor should be aware of the potential to use mechanic's liens as a means of enhancing collection of accounts receivable.

Every industry has problems collecting its accounts receivable. Contractors are afforded the right to file a **mechanic's lien** against the property that was improved by their work. Because such a lien is an encumbrance against title to the property, it provides a contractor with security for its unpaid account, enhancing the chances of collecting the outstanding balance.

Both Ohio and Kentucky law allows a contractor who performs work on improvements to property to file a lien for unpaid amounts. If, prior to the delinquency, the contractor takes the necessary steps to assure the placement and validity of the lien, the chance of collection can be enhanced at a very affordable cost.

A contractor should have its accounts receivables officer in regular and early communication with legal counsel for the company, to identify delinquent accounts and initiate the process for collection. The accounts receivables officer and the attorney can work together to obtain the relevant information, send the necessary notices, and file appropriate lien documents within the deadlines required by law, and thus properly effectuate the lien on the property.

If the contractor is a subcontractor working under the general contractor, the lien provides an opportunity to put the owner on notice that the subcontractor has not been paid, thereby providing leverage for payment, whether by means of payment from the general contractor, a joint check, or a direct payment from the owner. The lien causes the owner to get involved since the lien impairs title to the owner's property and raises the possibility of foreclosure. For example, an electrician who contracts with a general contractor to install electric service can file a lien against the owner's property since it was benefited by the electrician's work. A properly filed lien will require the owner to see that the subcontractor is paid, even though the electrician did not have a direct contract with the owner. If the lien is timely and properly filed, the contractor can effectively obtain payment from the source of the construction funds, without risk of the default by the general contractor or appropriation of the property owner's funds to other projects or other subcontractors.

The procedures are fairly simple.

In Ohio, a contractor must take certain preliminary steps when it *begins* a new job (it cannot wait until payments are overdue). Upon being awarded a job, the contractor must obtain or request a Notice of Commencement from the property owner or general contractor. The Notice of Commencement advises of several important facts, including the following: (1) the identity of the property owner, general contractor, lender, and surety for the project; (2) the legal description of the property; and (3) the date of the initial contract between the owner and the general contractor. The subcontractor is required to serve a Notice of Furnishing on the owner and general



contractor within 21 days after its first work on the project. The Notice of Furnishing notifies the owner and general contractor of the following (1) identity of the subcontractor claiming entitlement to be paid; (2) identity of the party the subcontractor is working through (the general contractor); and (3) date of its initial work. If the subcontractor is not paid, it can record an Affidavit for Mechanic's Lien within 75 days after its work is complete (on non-residential jobs). The subcontractor must also mail a copy to the owner and general contractor by certified mail. By doing so, the subcontractor has effectively protected its rights to payment upon proof that payment is due.

In Kentucky, a notice letter must be sent to the property owner by certified mail within 120 days after the last work performed by the contractor (the time period is shortened to 75 days if the claim is for less than \$1,000). Subsequently, a lien statement must be filed at the courthouse within six months after the last work was performed. A title examination of the courthouse records must be done to assure the name of the property owner and the proper legal description of the property that was improved. A property address alone is an inadequate description of the property. Formalities required include the proper name and address of the property owner. In Kentucky, a suit to foreclose the mechanic's lien must be filed within one year after the lien statement is filed, or the lien is dissolved by law. In Kentucky, because of the 120-day notice requirement, accounts receivables that are older than four months are not subject to this enhanced collection procedure.

Conclusion

Every contractor who performs services or supplies material for the improvement of property should contact its legal counsel and implement a program for the timely fulfillment of the formalities required to assert a lien, if necessary, against the property. Filing a lien is an effective way to provide maximum leverage for collecting, rather than writing off, accounts receivable.

Tim Theissen works in Strauss & Troy's Kentucky office and regularly practices in the areas of real estate, domestic relations, estate planning, and small businesses. For more information on mechanic's liens, please feel free to contact Mr. Theissen at (513) 768-9711.

The Importance of Updating Your Estate Planning Documents

by Marilyn J. Maag

The recent publicity surrounding the death of Anna Nicole Smith serves as a valuable reminder about the importance of re-examining your estate planning documents on a periodic basis. News reports indicate that although Ms. Smith had a will, it did not make provisions for her only surviving child. The will was executed before the child was born and, therefore, made no reference to her. Neither did it include language addressing children born after the will was executed.

Because modern life is typified by constant change, estate planning documents that were appropriate at one stage of your life may be inappropriate at a later date. Having children, moving, or experiencing other changes are some



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News of the Firm



Bill Strauss

Bill Strauss was selected by the *Cincinnati Business Courier* as a member of *Who's Who in Prestigious Homes*, an elite group of professionals with expertise in various areas related to home construction, financing, and ownership.

The *Cincinnati Business Courier* selected **Paul Calico** as a member of *Who's Who in Greater Cincinnati Advertising, PR & Design* in the area of Corporate Communications. Paul is the Chair of the firm Marketing and Community Relations Committee and the Executive Editor of *Impact*.



Paul Calico

Paul Calico and **Charles Ashdown** were featured speakers at a seminar on Construction Lien Law, sponsored by Lorman Education Services for construction professionals. Paul spoke on *Alternatives to Litigation: Effective Dispute Resolution*; Charles spoke on *Recent Legal Developments*.



Charles Ashdown

Tom Stachler and **Charlie Melville** made a joint presentation to the Manufacturer's Agents of Cincinnati (MAC), a local chapter of the Manufacturers' Agents National Association (MANA). Their presentation addressed "electronic evidence," the legal concept of "nexus," and significant provisions in manufacturers' agent contracts.



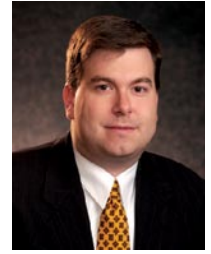
Tom Stachler

Tom Stachler also recently lectured at the annual symposium of the Greater Cincinnati Chapter of the American Association of Critical Care Nurses. Tom's presentation focused on "The Legal Pitfalls of Nursing – How to Protect Yourself." In addition, this spring marks Tom's eleventh consecutive year teaching Trial Practice at the University of Cincinnati College of Law.



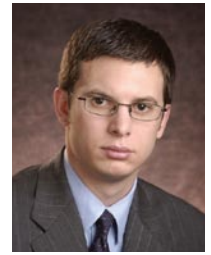
Charlie Melville

Joe Braun was re-elected as President of the Clermont County Library Board of Trustees. As part of the Clermont County League of Women Voters' "Now You Are 18" lecture series, Joe spoke to Milford High School students about their legal rights and responsibilities. He also addressed the Cincinnati Bar Association Young Lawyers Section on Recent Issues in Municipal Law. Finally, Joe's St. Xavier High School mock trial team advanced to the Regional Competition.



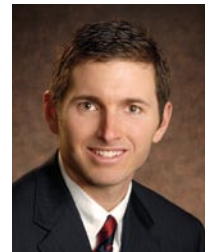
Joe Braun

Jason Tonne was appointed the Vice Chair of the Colerain Township Board of Zoning Appeals.



Jason Tonne

Bill Williamson was named to *Golfweek's* mid-amateur (ages 25-55) All-American Golf Team for 2006. Bill was also appointed to the Board of the Greater Cincinnati Golf Association Foundation, a local non-profit organization responsible for overseeing golf in the Greater Cincinnati area.



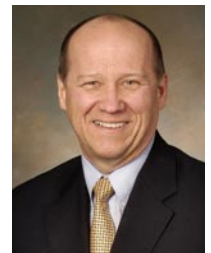
Bill Williamson

Aimee Cordrey was appointed co-chair of the Cincinnati Bar Association's Young Lawyers Section, Community Service Committee. The Committee's upcoming events include the Relay for Life event benefiting the American Cancer Society and spring mulching work for Boys Hope/Girls Hope.



Aimee Cordrey

Bill Woods, the firm Executive Director and the Treasurer of the Cincinnati chapter of the Association of Legal Administrators (ALA), will be one of 30 international delegates to visit China in October, focusing on Chinese law firm and business management. Bill is also the Cincinnati Representative for the International Legal Technology Association (ILTA).



Bill Woods

Strauss & Troy Proudly Salutes its 2007 Ohio Super Lawyers and Rising Stars

Strauss & Troy congratulates its 2007 "Ohio Super Lawyers," an honor awarded to the top 5% of Ohio lawyers, and its "Ohio Rising Stars," the top 3% of attorneys under the age of 40. Our "Super Lawyers" and "Rising Stars" are an important part of the Strauss & Troy team, providing personal service to our valued clients and building the long-term relationships that are a hallmark of our firm.

Ohio Super Lawyers: Claudia G. Allen, Paul B. Calico, Ann W. Gerwin, James G. Heldman, Marilyn J. Maag, Thomas C. Rink, Andrew M. Shott, Thomas L. Stachler, William V. Strauss, R. Guy Taft, and Richard S. Wayne.

Ohio Rising Stars: Joseph J. Braun, Matthew R. Chasar, Andrew R. Giannella, John M. Levy, Nicole M. Lundrigan, Lori A. Ross, Michael A. Ruh, Pete A. Smith, and Jason D. Tonne.

Business Spotlight



Entrepreneurs' Organization Cincinnati

Entrepreneurs' Organization and Strauss & Troy — A Partnership in Business and Community

Chris Frutkin has been an entrepreneur since grade school. Today, the 42-year-old owner and president of City Center Properties, LLC, a local condominium developer, continues that tradition and is making it his mission to help other like-minded individuals through his work as the president of the Cincinnati Chapter of the Entrepreneurs' Organization (EO).

On the occasion of EO's 20-year anniversary, it has established a partnership with Strauss & Troy as part of its continuing efforts to uncover new opportunities for the organization's 56-member Cincinnati chapter. EO members are founders, co-founders, or controlling shareholders of companies in many different industries, from manufacturing, retail, and accounting to real estate, pharmaceuticals, and service industries — industries in which Strauss & Troy has been actively involved during its 54-year history. The two organizations will spend the next three years collaborating to help EO's members grow and expand their businesses.

Frutkin says the invitation-only global community for entrepreneurs enriches members' lives through dynamic peer-to-peer learning and once-in-a-lifetime experiences. EO recognized that Strauss & Troy has the personnel and expertise to make a valuable contribution, and it is looking forward to a mutually beneficial relationship.

The firm will provide support for EO's work by securing high-profile speakers for EO's educational events and providing meeting space for the organization's smaller forum groups. These seven- to eight-member groups meet monthly to discuss relevant business and work-life balance

issues. Strauss & Troy attorneys will provide forum groups with legal and business education on topics such as buying and selling a business, exit strategies, employee benefits, real estate, and any other topics of interest to EO members.

"It's a perfect fit for us," said Tony Barlow, the attorney heading up the partnership for Strauss & Troy. "We've been serving the needs of business owners in a broad capacity for decades. And our strategic partnership with EO is a natural extension of the firm's commitment to community. Since entrepreneurs are the future of small business in the region, the firm wants to do its part to assure that this entrepreneurial spirit thrives."

Strauss & Troy has demonstrated a deep commitment to its clients and the greater Cincinnati community, alike. The firm and its employees have a long and rich tradition of sharing gifts and talents with others in the community, as detailed from time to time in *Impact*. EO members are likewise committed to making a difference in Greater Cincinnati.

"EO members strive to make a difference and leave a legacy. They want to win the game on all levels and they do it through optimism, cooperation, and giving back to the community," Frutkin says.

Frutkin sums it up by saying, "The end result is that EO members have learned

how to better operate their companies, work reasonable hours, make more money, lead fulfilling personal lives, and make a difference in their communities. This is an amazing way to live. We look forward to Strauss & Troy assisting us on this journey."



Upon becoming a lifetime EO member, entrepreneurs are transformed through honest peer feedback in a completely confidential setting. EO uses the Gestalt method of sharing personal experiences — not providing advice — with the knowledge that "ego is checked at the door." Members discuss business, family, and personal issues with equal importance. They receive professional training, attend an annual group retreat, and meet monthly without exception.

To join EO, each member's company must have reached \$1,000,000 in annual revenue. The Entrepreneurs' Organization helps thousands of business owners build their futures. Here are a few facts about the organization:

Average EO member age:	37
Global Membership:	6,400
Global Chapters:	120
Countries with EO Chapters:	41
Cincinnati membership:	56
Cincinnati EO Chapter President:	Chris Frutkin
Formerly known as:	The Young Entrepreneur's Organization

For more information on EO: www.EOCincinnati.com

The Legal Duty to Preserve Electronic Business Records: The New Rules *continued*

1. The organization should have reasonable policies and procedures for managing its information and records.
2. The policies and procedures should be realistic, practical, and tailored to the organization's circumstances.
3. It is not necessary to retain all electronic information ever generated or received.
4. The organization should also develop procedures to address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.
5. The policies and procedures must mandate the suspension of ordinary destruction practices to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit.

Beyond these starting points, companies should consider the following:

- Developing the record management plan should be a business priority. In addition to the key and continuing roles of in-house counsel and IT specialists, senior management should be actively involved in reviewing, revising, and approving the plan, as well as re-evaluating it as necessary.
- Periodic re-evaluation is essential so the system reflects current technology.
- There is no "cookie cutter" or single best system that will work for all organizations. The system should reflect the organization's unique architecture.
- The system cannot allow destruction of "bad" or embarrassing documents. This can lead to the most severe sanction of default judgment.
- It is important to educate all employees about the record management program. Monitoring implementation and observance, including periodic compliance reviews, is also important.
- Destruction of documents pursuant to a reasonable retention plan does not constitute spoliation, even if they later turn out to be relevant to litigation. To quote the Sedona Guidelines, "[i]t is imperative, however, that destruction is carried out consistently and non-selectively in conformance with the standard operation procedures of the organization."

Litigation Holds — Pre- and Post-Litigation

Events may arise that require a business to interrupt its routine record deletion policy and place "holds" on the destruction of records. This can happen both before and after litigation is commenced. The duty to place such holds arises most clearly when a party is actually sued, but it also arises upon notice of a possible claim or suit, such as an accident or product failure that is likely to give rise to a future controversy.

Once there is a suit or potential claim, the legal department will likely become a central decision-maker working with IT personnel and others in implementing the hold. It is essential to issue a hold on document destruction as promptly as possible. Initially, depending on the size of the organization, the hold might be company-wide, but can later be tailored to persons and departments likely to have relevant information. As this analysis develops, other persons or departments within the organization can be released from the hold and routine documents destruction recommenced. The need for a

hold on destruction should be effectively communicated in a way that makes clear the importance and immediacy of the hold.

It is wise for the legal department to create a checklist of circumstances when such a hold might be triggered. Prior to explicit notice or actual suit, the policy should include such matters as who has the authority to issue a hold, who is responsible for communication of the hold within the organization, who is responsible for implementation, and who has the authority to release the hold in whole or in part.

The hold may also need to include third parties, such as accountants, who might have relevant documents that are effectively in the control of the company.

A recent case addressed the difficult issue of when a duty to preserve specific records might arise prior to explicit notice or the filing of suits. The court held that the duty arises if the company has notice that litigation is likely, but not if it is a mere possibility. Part of the court's analysis included the burden and cost of preserving vast amounts of evidence. The court also recognized that the total cessation of routine practice could create the undesirable result of greater accumulation of massive and irrelevant data that would ultimately be more time-consuming and expensive.

Conclusion

In the final analysis, the new rules recognize the practical reality that no system can be perfect and that a good faith and reasonable system should provide protection, even if some relevant electronic documents are unintentionally destroyed. A convenient way of stating a goal for legal protection is to take all reasonable steps to make the preservation system as perfect as practically possible, given the business needs and limits of the organization.

Bill Jacobs is a member of the firm's Litigation Department and regularly practices in the areas of corporate, intellectual property, and construction law litigation. For more information on record retention and the preservation of electronic documents, please feel free to contact Mr. Jacobs at 629-9455.

The Importance of Updating Your Estate Planning Documents *continued*

of the reasons people may want to re-examine their estate plans. People sometimes lose touch with persons named as executors or guardians under their will, making them poor choices. Simply stated, it is advisable to look at your estate planning documents to see whether they accurately express your wishes. Often, only minor changes are needed to update the documents.

It is a good idea to contact your lawyer at least once every five years to discuss your estate plan. In addition to discussing changes in your life, your lawyer can also advise you about new or revised laws and ideas about updating and improving your estate planning documents. Reviewing your estate plan on a period basis ensures that your estate planning documents accurately reflect your intentions.

Marilyn Maag is a member of the Strauss & Troy Estate Planning Department and regularly practices in the areas of estate planning and probate law. For more information on estate planning, please feel free to call Ms. Maag at 629-9485.

Taft IT High School Students Celebrated Freedom and Literacy with Freedom Writers Project

For the third year, Strauss & Troy's philanthropic Make a Difference (MAD) Team partnered with the Cincinnati Public Schools to sponsor the *Freedom Writers* competition, a part of Taft Information Technology High School's 2006-2007 curriculum. The program promotes literacy among inner-city youth and encourages the pursuit of higher education in the field of Information Technology. Students in each grade level were asked to write an essay on the topic "Effects of War in America." From over 100 students who submitted essays, 25 winners were chosen.

On April 19, the winners were transported by Trolley to the Christian Waldschmidt House/Camp Dennison Ohio Civil War Museum for a special guided tour. They then traveled to Strauss & Troy's offices for lunch and an awards ceremony. During the ceremony, all students were individually recognized for their participation in the essay contest; 15 students received gift cards to Wendy's; the top five students received \$50 gift certificates to Wal-Mart; and the grand prize winner, Katherine Greene, won a laptop computer. Strauss & Troy congratulates all students who participated.

Best Wishes to a Dear Friend

Norman G. Miller, Ph.D. (pictured at left with Strauss & Troy president Bill Strauss), was the guest speaker at Strauss & Troy's May 24 "Obtain Global



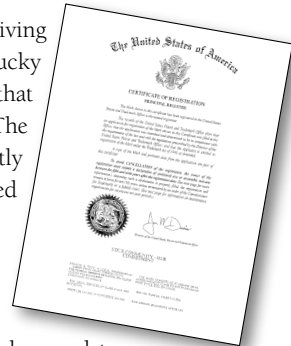
Reach" real estate investment and development seminar. Strauss & Troy wishes Dr. Miller the best of luck as he leaves his position as the director of UC's Real Estate Center to join the University of San Diego. We hope that he and his family enjoy many years of continued success and happiness.

The rules of the Supreme Court of Kentucky require the following statement in any material of this type: "THIS IS AN ADVERTISEMENT." If you wish additional or more specific information, please contact one of the attorneys at Strauss & Troy.

*Your Community—
Our CommitmentSM*

SPONSORSHIPS

Strauss & Troy takes great pride in its tradition of giving to the Greater Cincinnati and Northern Kentucky communities and, as further evidence of that commitment, we are pleased to announce that The United States Patent and Trademark Office recently recognized the firm's exclusive rights to the registered service mark:



Your Community – Our CommitmentSM

As part of our continuing commitment to the communities in which we work and live, we are honored to have supported the following organizations, programs, and events in the last few months:

- Asian-Indian American Business Group
- BLAC (Black Lawyers Association of Cincinnati)
- Blessed Sacrament Athletic Boosters
- Boys & Girls Clubs of Greater Cincinnati
- Cedar Village
- Chabad Jewish Center
- Cincinnati Arts Association
- Cincinnati Bar Foundation
- Cincinnati Childrens Choir
- Cincinnati Flying Pig Marathon
- Commercial Real Estate Council of Greater Cincinnati
- Covington Rotary Club
- CREW Network
- Dixie Heights High School Project Prom
- The Midwesterners
- Rape Crisis and Abuse Center
- St. Aloysius Orphanage
- Welcome House of Northern Kentucky
- YMCA of Greater Cincinnati
- YWCA of Greater Cincinnati

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