

# A Legal Pitfall in a Green World

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From eco-friendly envelopes to hybrid vehicles, "going green" is no longer for those naturalists roaming Northern California in Birkenstocks. Whether out of fear of global warming, a strict adherence to the mantra of Al Gore, or to keep up with current trends, many businesses are turning green. While changing a light bulb and ordering recycled paper are common steps toward a greener company, a leading contributor to being able to reduce waste has been advances in technology and the ever-growing capacity of electronic data storage.

## Communication Preservation: Then and Now

In the past, many companies would fill file rooms, storage rooms, and warehouses with paper documents consisting of and reflecting the company's business. Nowadays, nearly all of that information can be reduced to a single electronic drive taking up less space than the size of your thumb (i.e., "thumb drive"). Even the manner in which employees and businesses communicate has created a greener world through technology. Previously, a paper letter may have been generated and stuffed into an envelope for the purpose of sending it to its primary recipient, but then also copied onto other papers, stuffed into other envelopes, and sent to all of the "cc" recipients. This of course does not take into account the number of additional copies that were created for archival purposes. Now, that same information (and more) can be easily distributed through a single email, vastly reducing a company's carbon footprint.

However, in our electronically-advanced greener corporate world, there are new challenges that companies face. One of those challenges concerns how companies handle the preservation of this vast amount of electronic information, when it can so easily be destroyed through a single keystroke of the delete button. Many companies are simply not aware of their legal obligations to preserve and maintain electronic data, not only upon the commencement of litigation, but more importantly at the point in time that the company should reasonably believe that a dispute has arisen. It is this obligation which must be taken seriously in order to avoid the grave consequences that courts are now more frequently imposing.

## Document Retention and Destruction Policies

Every company should have a document retention/destruction policy, which applies not only to its paper documents, but especially to its electronic data. For example, a company may decide to purge documents that are more than five years old. Similarly, a company may elect to delete and destroy emails that are more than 90 days old, on a rolling basis. However, when a dispute arises, companies must suspend any and all document destruction protocol which encompasses information and data relating to the nature of the dispute. Not only should a company be equipped with a written policy for its document preservation and destruction, but it must also be armed with a protocol for internal notices to be sent to appropriate personnel and/or departments suspending the destruction policy when a dispute arises that concerns the information or data which may be destroyed. This is especially true in light of the amount of electronic information that is accessed outside of the company's normal confines, such as by remote logins, smart phones, instant messaging and text messages.

## The Importance of Electronic Document Retention

Albeit slightly behind the times, courts are now very quickly coming up to speed with respect to issues concerning the handling, maintenance and production of electronic information. Within the last year, new laws have been passed concerning the obligations of companies to preserve and produce electronic data, including severe consequences for companies' failure to do so. While California's Electronic Discovery Act recently went into effect in June of 2009, for the past five years or so courts around the

country have been holding companies responsible for the destruction of electronic evidence.

In the seminal case of *Zubulake v. UBS Warberg, LLC*, which was an employment discrimination case, a jury awarded the plaintiff more than \$29 million, which consisted of more than \$20 million in punitive damages. One of the central issues that led to the imposition of punitive damages was the defendant's failure to produce certain emails which had been destroyed. The court instructed the jury that since the defendant destroyed electronic documents (albeit possibly through its routine document destruction policy), it could be inferred that those documents were harmful to the defendant and supported the plaintiff's case (even if they actually did not).

## Conclusion

In light of the manner in which courts are beginning to hold companies responsible for the destruction of electronic data, as well as the new California Electronic Discovery Act, it is imperative that companies in this new electronically green world have the proper procedures and protocols in place relating to the preservation and destruction of their electronic documents, as well as the ability to quickly create a litigation hold as soon as a dispute arises pertaining to electronic data that might otherwise be routinely destroyed. An ounce of prevention in this regard will likely save a company millions down the road.

Marc P. Miles is an experienced civil litigator who specializes in complex business litigation, as well as employment law and intellectual property cases. In addition to obtaining multi-million dollar verdicts and settlements, Mr. Miles has handled a variety of complex appeals, which include having successfully argued before the federal Fourth Circuit Court of Appeals and the U.S. Supreme Court. Mr. Miles was recognized as a "Rising Star" by *Super Lawyers* magazine. This honor is reserved for the top 2.5% of lawyers in Southern California under the age of 40. This is the sixth year in a row he has received this honor. Mr. Miles also received the honor of being named a National Finalist of *Lawdragon's 500 Leading Lawyers in America*. Mr. Miles is admitted to the California Supreme Court, and is also licensed to practice before the U.S. Supreme Court, the U.S. District Courts of California, and the Second, Fourth and Ninth Circuit federal Court of Appeals. Contact Mr. Miles at Callahan & Blaine, 3 Hutton Centre Drive, Ninth Floor, Santa Ana, CA 92707; phone (714) 241-4444; visit the website at [www.callahan-law.com](http://www.callahan-law.com)

