

e-DOCUMENT RETENTION TEAM

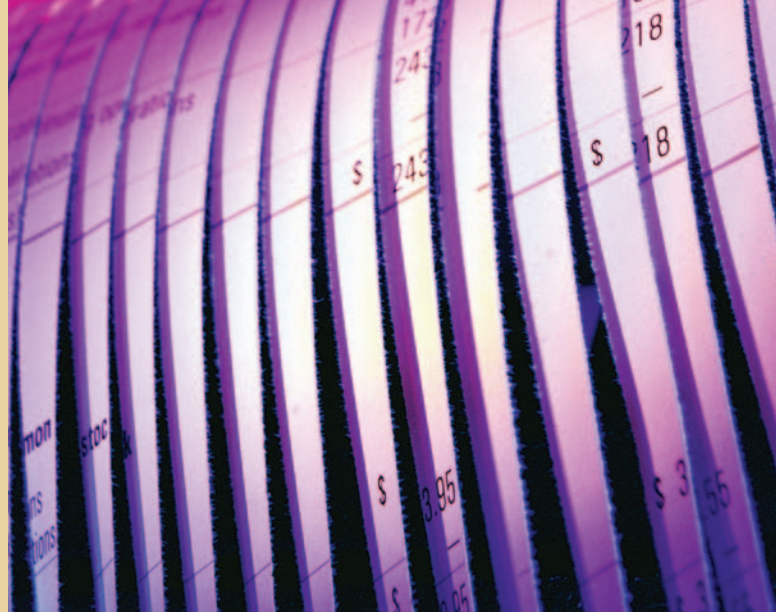
KEEPING INFORMATION
UNDER CONTROL



BENESCH

Friedlander Coplan & Aronoff LLP

Attorneys at Law



Lawsuits in the digital age have become more perilous to companies and their counsel. As digital information and databases proliferate, the vast amounts of content generated are increasingly difficult to control. Even so, the law has certain requirements, and the penalties for failing to have a rational policy for retaining or discarding data have been severe.



CASE IN POINT

\$1.4 Billion in Damages Tied to e-Document Mishandling

A recent case involving Morgan Stanley and Coleman (Parent) Holdings (CPH) highlights the importance of proper e-document retention and management.

Morgan Stanley was ordered to pay CPH \$850 million in punitive damages and \$604.3 million in compensatory damages in a suit in which CPH had sued Morgan Stanley for fraud in connection with a stock sale to Sunbeam Corporation. Central to the case was Morgan Stanley's inability to prove it had no knowledge of the Sunbeam fraud, largely because it could not produce pertinent e-mails generated during the time in question.

Specifically, Morgan Stanley failed to meet SEC regulations to preserve e-mails for 24 months (it had overwritten them after 12 months), failed to disclose the presence of backup tapes, and failed to adequately search archived e-mails and attachments as required by the Court during the discovery phase of the litigation. As a result, not only could Morgan Stanley not establish its defense, its mishandling of the evidence and failure to comply with the Court's order clearly influenced the jury to find in favor of CPH.

To Keep or Not to Keep?

A number of prominent companies that have failed to maintain electronic documents in the face of discovery, or even when they knew or should have known that a lawsuit was threatened, have faced sanctions. These have included adverse inferences, default judgments, and costs of compliance with court orders to complete production of data. The old rules relating to spoliation of evidence—destroying evidence in the face of a lawsuit—are more complicated when storage capacity may be limited.

In view of these risks, companies should have a rational e-document retention policy. The goal is to retain documents that are most pertinent to the business while still being able to regularly purge or discard non-critical documents in both hard copy and electronic form. Crafting this policy and coordinating the effort internally may require input from IT, HR, financial, and other executives, as well as outside counsel.

Managing the Tide

The attorneys of the Benesch e-document retention team can help you establish and implement a retention policy to avoid legal mishaps and appropriately control relevant business documents. In this developing field, companies and their counsel need to have a working knowledge of recent case law as well as proposed amendments to the Federal Rules of Civil Procedure, and guidelines proposed by a group of experts at the Sedona Conference. Our attorneys have that base of knowledge and regularly assist clients in document retention matters.

In addition, outside expertise may be needed to determine whether a company is appropriately handling its metadata, disk drives, databases, and other repositories of electronic information. Benesch attorneys coordinate frequently with one of the leading technical firms with expertise in this field.

Moreover, insurance companies are likely to start pricing their insurance policies based in part on whether business policyholders have an effective document retention policy in place. Our services will help you position your business to obtain insurance protection at a reasonable cost.

Protecting Our Clients' Interests

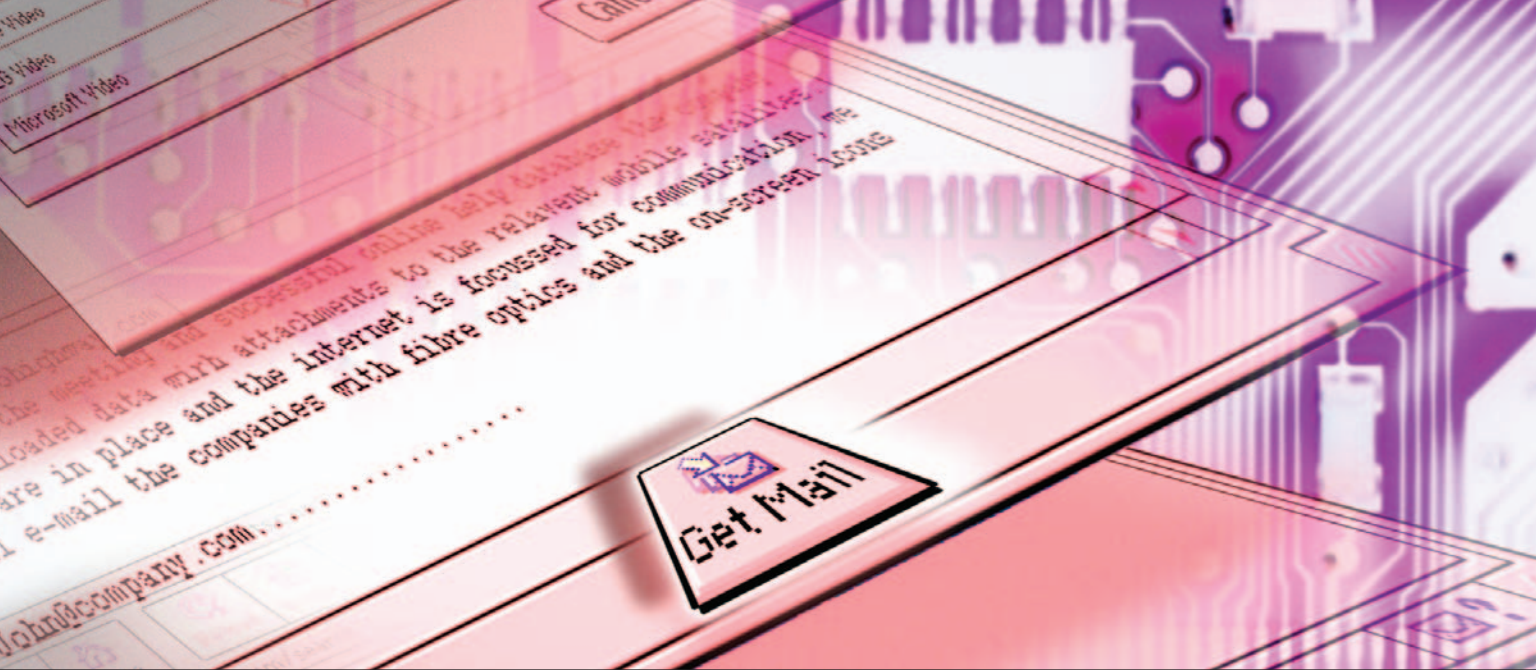
We are well-versed in the technical and legal means necessary to assist our clients and protect their interests in e-document retention matters. Here are a few representative cases:

- In a trade secret case, we obtained an *ex parte* order to seize computers for forensic analysis after a salesperson left for a competitor and significant customer information was deleted from the client's systems. Working with IT forensic professionals, we found and were able to prove that the salesman and new employer had hacked into the client's systems and directly transferred hundreds of customer files and records directly to the competitor's system. As a result, we were able to obtain a preliminary injunction protecting the customer relationships and a satisfactory settlement for our client.
- While defending an employer in a noncompete/trade secret case, allegations arose that our client's new employee had gone AWOL in the last week of employment with the former

employer in order to sabotage that former employer. We obtained an order to have forensic professionals copy and examine e-mail systems, and determined that not only was the employee not AWOL, he was in regular e-mail contact with the CEO and COO of the former employer during the period in question (both of whom had signed affidavits stating he was completely out of touch). This evidence contributed significantly to a very favorable settlement.

- In prosecuting a trade secret case, where two management employees left our client to begin competitive operations for a former supplier, we were able to obtain through discovery the supplier's system backup tapes. These tapes revealed that the former supplier had obtained the client's manufacturing process designs and used them to pattern the processes it used to enter our client's market segment.





With this evidence, we were able to obtain preliminary and permanent injunctive relief and a satisfactory settlement for our client.

- In defending a pending sexual harassment case, we worked to design an effective and efficient procedure for searching and preserving all e-mail records and computer activity in advance of discovery.
- We prosecuted a claim of spoliation of evidence against an attorney and his client, who allegedly destroyed the only copy of an agreement that transferred ownership in a company to our client. We received an order appointing a forensic computer expert, whose work located the first page of the destroyed operative document and revealed that the attorney had been searching Internet sites that teach how to erase a computer hard drive. The expert also verified that the attorney had engaged in an effort to overwrite data that had been deleted in order to make a forensic recovery.

Our collective work on these and other matters related to e-document retention has given us a broad understanding of the issues and deep knowledge of how to protect our clients' interests.

Helping You Take Control

The digital world continues to expand at a dizzying rate. Estimates place the number of person-to-person e-mails alone between 36 and 40 billion worldwide on an average day. Clearly, managing and properly retaining information relevant to your organization will continue to be a challenging proposition. The legal requirements are also clear—to ignore them or fail to achieve full compliance exposes you to serious risk. The Benesch e-document retention team is ready to help you develop a practical, legally compliant policy. Talk to us about getting started.

Benesch, Friedlander, Coplan & Aronoff LLP has been providing sophisticated legal and business advice to regional and national middle market and emerging companies, public companies, entrepreneurs, venture capitalists, and private equity funds and their portfolio companies since 1938. We are committed to building relationships with clients, and strive to be counselors, advocates, and partners in all aspects of a transaction or litigation issue. Playing an instrumental part in clients' successes is the goal of each member of the Benesch team. Today, we have offices in Cleveland and Columbus, and our subsidiary, Benesch Pacific LLC, has a representative office in Shanghai.

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