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Records Management And The Role Of The Law Department: Some Musings

By Steven A. Lauer

Records management was a topic that, while recognized by many (especially in-house attorneys) as important, represented the "Rodney Dangerfield" of corporate affairs: it received little respect. That all changed several years ago when Arthur Andersen, a respected member of the small group of international accounting and consulting firms, stood convicted of federal crimes related to its records management practices and its relationship with the Enron Corporation (a client). Soon after that conviction, Arthur Andersen disappeared as an ongoing firm despite its decades-long history and reputation.

More recent events have underscored the significance of records management. Its importance for Corporate America is now well recognized. In-house counsel now devote much time to devising records-management policies, responding to inquiries about the implementation of such policies and otherwise elevating records management to a higher-priority place on their to-do lists.

Records management comprises a portion of the subject of corporate compliance. The way in which a company deals with its information and records can greatly affect whether that company's ethics and compliance program is effective, not to mention establishing a basis for prosecution (as in the case of Arthur Andersen), if something goes awry.

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As an element of a corporate ethics and compliance program, a company's records management policy or program should address the interests and concerns of a variety of audiences. While those interests and concerns vary with the audience, they all provide some important perspectives for the proper design and implementation of the compliance program and, more specifically, the records management regime that the company adopts.

Which audiences serve that purpose? Without suggesting that this constitutes a comprehensive list of all those whose views must be taken into account by in-house counsel, some of those audiences are the following:

1. Government officials, including regulators (the SEC, EPA, HHS, etc.), lawmakers and others.
2. Members of the investment community.
3. Employees of the company.
4 Other groups, such as customers, joint venture partners, litigation counterparties.

For each of those audiences, a different response might address its concerns most directly. For example, investors care whether a company has undertaken adequate diligence regarding various risk-related issues but might express less interest than a government agency in whether that company has implemented an "effective" compliance program. Employees generally want to feel assured that the company for which they work does things the "right" way, so an ethics code embraced by senior management constitutes an important step in their view.

What developments have increased the significance of records management? One of the foremost events of the past few years was the enactment of the Sarbanes-Oxley Act of 2002, which represents the most wide-ranging response of Congress and the federal government to the corporate scandals of 2000 and 2001 (Enron, WorldCom, Adelphia, etc.). That statute created new requirements vis-à-vis records management, increased the penalties for violations of those mandates, heightened the financial accountability of corporations and their senior officers for certain misdeeds and focused renewed attention on the fiduciary responsibilities of corporate directors and officers.

Recognizing the importance to investors and government officials of evidence of corporate actions, Congress included in Sarbanes-Oxley some provisions that specifically address records-management issues. Examples include §802, which prohibits "knowingly alter[ing], destroy[ing], mutilate[ing], conceal[ing], cover[ing] up, falsify[ing], or mak[ing] a false entry in any record, document, or tangible object" with certain specified intent, and §1102, which provides for a sentence of twenty years in prison for "corruptly alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, or attempt[ing] to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." These represent significant changes to the law surrounding how businesses create, manage and destroy records.

While Sarbanes-Oxley made some of the more dramatic changes to the law of records management, other laws also contain very far-reaching provisions on that same subject. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) led to various regulatory initiatives that deal with the records that relate to individuals' health data. The Gramm-Leach-Bliley Act pertains to information about consumers of financial services and mandates that financial institutions take certain steps to protect that information. The USA Patriot Act provides for certain records-related protections, especially in

respect of anti-money-laundering efforts of companies.

As a result of these developments, in-house counsel now face a problem that, at least in magnitude if not in kind, they did not face previously. The certification requirements of Sarbanes-Oxley, increased distrust by investors and regulators, a greater likelihood of investigation, civil lawsuits and criminal proceedings if records are improperly altered or destroyed, the absence of standards for many of the new requirements and the dearth of judicial interpretation of many of these new requirements combine to present a minefield of expectations and demands.

The certification of a company's financial statements, for example, presents a particularly vexing subject. In making such a certification, a corporate officer cannot personally review and assimilate the huge amounts of information and the incredible number of documents that underlie those statements. Nonetheless, that officer must be prepared to certify (1) that he or she has reviewed the periodic report in question[1], (2) that the report does not contain any untrue statement of a material fact or fail to state a material fact necessary for the financial statements not to be misleading, (3) that the financial statements fairly represent the financial condition of the company, (4) that the certifying officer has designed the internal controls necessary to ensure that those statements are accurate and (5) that the officer has apprised the company's auditors and audit committee of any deficiencies in the design or operation of those internal controls and of any fraud that involves management or other employees who have significant roles with respect to those internal controls.[2] The fact that a false certification can lead to considerable penalties, both monetary and punitive, compounds both the significance and the difficulty of making that certification.

Unfortunately, the statute and even the regulations promulgated pursuant to that and other statutes provide minimal guidance as to how an organization's records-management policies and practices can comply with the mandates. As a result, in-house attorneys cannot rely on the statutory requirements alone. Records and processes designed for normal business practices may not pass muster under these strictures. Aggressive, pro-active analysis and action are necessary for inside attorneys to have and to provide to their internal clients the comfort desired on that score.

What do they need? Reliable procedures for the creation, retention, management and destruction of records. An ability to demonstrate that the procedures properly operate. Adequate training for all employees on the subjects of records and records management. An ability to demonstrate that training and its implementation.

What issues should such training address? Some examples are the following: What are the procedures for the creation, management and destruction of records? Who is responsible for those procedures? What is a "record"? When can a record be safely destroyed? How can the organization effectively locate relevant records, for purposes of litigation-related discovery, for example?

In-house counsel should ask questions regarding the training such as these: What might we have to prove and to whom in respect of the training? Can we develop and apply a reasonable standard? Can we develop a reasonable process that the organization can implement clearly? What records can we design that will prove the compliance of our process? How can we demonstrate satisfactorily to others that compliance?

Inadequate training and compliance almost certainly will lead to a number of negative results. These include excess storage costs, an inability to find relevant information for business purposes, repeated creation of similar information (recreating the wheel), excessive production during discovery in litigation and an inability to demonstrate appropriate protection of privileged documents.

An organization's law department should be integrally involved in that organization's records-management policies and procedures. Those policies and procedures must conform to legal standards, such as the laws like Sarbanes-Oxley, regulations issued by federal, state and local agencies, court rules and other standards. The law department should analyze (or oversee the analysis of) those requirements and their applicability, as well as the conformity of the company's procedures with those standards.

Given the scope and stakes involved in these issues, a law department should begin by developing a strategic plan by which it will manage those issues. The department's role in the firm's records-management regime should be set out in that plan. The department likely will serve as the monitor of the organization's implementation of the records-management procedures and protocols. The in-house attorneys should be prepared to respond to inquiries and questions in respect of those policies and their application.

What should the strategic plan address? First, the role of the law department in the company's records-management process deserves clarity. This will benefit employees throughout the company by providing them a vision of what they can expect of the in-house lawyers when they have questions about or encounter issues related to the records with which they must deal on an everyday basis. The lawyers will enjoy the increased certainty as to what the company expects of them in that regard. The issues to address include the following ones.

To what degree will those in-house lawyers assume responsibility for creating the records-management policies? The more participation that the in-house clients assume, the greater the buy-in they will possess in those policies. As important to those policies as legal analysis may be, the policies ultimately serve to assist the business to manage its knowledge and information efficiently.

Should the in-house lawyers serve as monitors of how the business implements it records-management policies and procedures? There are many reasons why such a role makes sense. The legal issues that arise over time will demand rapid analysis, which the lawyers will be well-positioned to provide if they are already intimately involved in monitoring that implementation.

If the company's employees encounter issues regarding records during their job activities, will they pose those issues to the lawyers? If the company expects its employees to call on the in-house lawyers in such situations, it ought to make that perfectly clear so as to avoid confusion. The importance of training on that subject for all employees of the firm is one aspect of records management that should be covered.

While these few issues do not exhaust the range of topics that might appear in a strategic plan, they should provide some food for thought. Law departments should begin the process by which they can prepare such plans because the process – strategic planning – constitutes a vital means by which to eliminate or reduce uncertainty in an organization's records management policy so as to minimize the likelihood of legal problems.

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[1] *I refer to the certifications required of the chief executive and chief financial officers as to the accuracy of financial statements by §302(a) of the statute.*

[2] *The statute requires that the Securities and Exchange Commission issue regulations containing those substantive requirements, which the Commission has done.* See *http://www.sec.gov/rules/final/ 33-8124.htm.*