

Florida Trend

July 2006

Of Counsel
Florida Law

By Cynthia Barnett

Data Morsels

E-data presents just as many legal problems as



hard copy — if not more.

The notion that e-mails and other forms of electronic communication are less than private is still not firmly established in the corner offices of corporate America: Recent cases involving Morgan Stanley and KPMG show that many executives and professionals still feel free to tap out incriminating e-mail messages — and continue to think the delete key gets rid of them for good.

Electronic documents are figuring more prominently in lawsuits such as wrongful termination, tax fraud, trademark infringement, breach of contract, gender bias and others. E-mail is just one slice of the e-discovery pie. What's archived in a Palm Pilot, stored on a cell phone, even playing on an iPod can be subpoenaed. Fines for willful destruction of electronic evidence have topped \$1 billion. Meanwhile, the Florida Bar and the courts are debating the yet-to-be-charted waters of metadata — hidden information that programs such as Word, PowerPoint and Excel store within a document. Metadata stays with a document when it's electronically transmitted. It's supposed to be hidden from view, but some software programs can mine it, revealing such juicy morsels as the editing comments and changes made in a document's history.

Karen Unger, president of Fort Lauderdale-based American Document Management, manages hard-copy and electronic documents for law firms and other businesses around the nation:

FLORIDA TREND: Is it true that we live in a paperless society, or do businesses still keep hard copies, and if so, what do they keep?

KAREN UNGER: There's more paper now than there was when I started this company in 1989. Our clients keep mission-critical documents; that is, those things required you keep by law or those that would be disastrous to lose. Mostly, this would be contracts that say someone is supposed to pay you money.

FT: Should Florida companies store these types of documents out of state to guard against hurricanes?

Unger: Actually, most clients seem to want their documents stored nearby. We're building a hurricane-resistant records center in south Florida. But we also recommend copying everything to a CD that goes into a safe-deposit box and another one that goes out of state.

FT: Are hard copies and electronic documents the same in the eyes of the law?

Unger: They both provide communication between entities, they convey information and they are discoverable in a court of law. But electronic documents are also very different than paper. E-mail and e-documents have greater volume, are more apt to re-create themselves and just can't seem to be killed.

FT: So how do you get rid of e-documents? And is it kosher to get rid of them?

Unger: There are ways to pseudo-shred. The most important thing is to have a document-retention policy. It has to be specific, it has to be written down and it has to be applied consistently. Almost all businesses have a little tape drive next to the computer to back it up. If you consistently rotate the tapes and destroy all previous versions of documents every three months, then if someone comes along and sues you, you'll be OK if you were consistent. If you don't have that written policy though, you're toast.

FT: What got Morgan Stanley and KPMG into trouble?

Unger: The crucial mistake was that they kept destroying documents after they knew they were being sued. If somebody says they're going to sue you, you immediately need to go into a "litigation hold." You need to stop rotating those tapes. There always seems to be somebody trying to be helpful by getting rid of documents, and that's the last thing you want. The three critical steps are having the retention policy, backing up mission-critical documents outside the office and talking to everybody, including the IT department, once you know litigation is predominant.

FT: A Florida Bar ethics committee recently passed a resolution expressing disapproval of lawyers "mining" metadata from electronically transmitted documents. Can you explain metadata? Is it discoverable?

Unger: Metadata exists in electronic documents to help computers find what they're looking for. It tells the computer, I'm a Word document, or I'm a spreadsheet. It's data about the data: When it was created, the file type, the day it was last accessed. The Board of Governors here in Florida came out with a statement that they think it's unethical to mine this data. I'm not an attorney, and I can only comment on what's happening with my clients around the country — in most states, not only is metadata discoverable, but most courts are saying you must produce it. It's part of a document. I tell my clients that they have to be aware of metadata, and again, have a consistent policy. I think attorneys should look at metadata. Sometimes it will just lead to questions, but sometimes it might lead to wrongdoing.

FT: Can you get rid of metadata?

Unger: There are some systems that you can put on your server that do something called scrubbing; it can clean out metadata in

one or all fields. You can have handcuffs on if you do this after you've been served. This is all emerging case law. Each state and federal law will be different. I think you have to get your attorneys on board and come up with a consistent policy.



"There are ways to pseudo-shred. The most important thing is to have a document retention policy."

*Karen Unger,
President of
American
Document
Management*

FT: What's your advice about e-mail?

Unger: People make statements in e-mails that they would never put in writing or even speak in another context. It's often viewed as a social conversation rather than an official record. You should consider it a record. Sometimes it's a very, very good idea to get up out of your chair and walk down the hall to have a conversation.