



# E-MAIL: Be sure to preserve it — all of it

FROM CI

## EXCERPTS FROM WHITE HOUSE MEMO

ALBERTO GONZALES, WHITE HOUSE COUNSEL'S OFFICE, TO WHITE HOUSE STAFF, Sept. 30:

It was an e-mail that asked Credit Suisse First Boston staff to "clean up" files that led to obstruction of justice charges against Frank Quattrone, a former star investment banker. E-mails were noteworthy in the President Clinton/Monica Lewinsky scandal. Examples of e-mail as crucial evidence are now too numerous and common to ignore the phenomena.

Like the White House in the current scandal, businesses are sometimes required to preserve evidence, including e-mails. This duty can arise even before a lawsuit, when a company learns that litigation is likely.

In addition, some businesses are subject to statutory or regulatory obligations to preserve electronic evidence. Businesses are well served by following these requirements.

Preserving e-mail, however, isn't as simple as saving paper printouts of e-mails. Rather, as the White House learned on the last day of the Reagan administration when it was prevented from destroying certain backup tapes, the electronic record of the e-mails may need to be preserved as well.

The e-mail backup tapes in the Reagan administration contained e-mails of then National Security Council employee, Oliver North, who was embroiled in an infamous employee misconduct scandal called the Iran-Contra Affair.

The federal court later ruled that a printout of an e-mail is a "disembodied document" because it can omit important parts of the original electronic version, such as data about the sender and recipients of the e-mail.

Therefore, if the employees involved in the workplace problem use e-mail, it is not enough to save paper printouts of their exchanges. Some executives may think they'd be better off not to preserve potentially incriminating evidence, reasoning "Won't this create problems by preserving e-mails that

will be used against us?" However, following through on this knee-jerk reasoning would be illegal, and another anecdotal example of the lack of corporate ethics that seems to exist in boardrooms today. And before doing so, companies should consider the consequences.

The investment banking firm SG Cowen took a public relations drubbing and paid a \$100,000 settlement this summer for failing to retain e-mail backup tapes. Cowen produced 39,000 e-mails in a lawsuit involving a former employee, but failed to produce many others because it didn't preserve tapes for three years, as required by statute. It was an expensive lesson, especially considering that it costs next to nothing to save backup tapes.

The lesson need not be so hard taught. When litigation is likely, companies should immediately and simultaneously implement the following measures:

- 1. Instruct employees, in writing, to retain documents, including e-mail, electronic calendars, and word processing documents that may relate to the relevant subject matter and time frame, and keep a copy of this notice.

sometimes they try to destroy electronic evidence by deleting the incriminating files and e-mail. If a tech savvy employee deletes incriminating e-mail, the deleted e-mail may not be saved on the e-mail server's backup tapes. To make matters trickier, though it is often possible to retrieve deleted files for a period of time, they can be automatically lost over time if the computer remains in use. So it is necessary to forensically preserve and investigate the computers of all relevant employees.

Protect your company against the wrongful and automatic destruction of evidence by creating an evidence quality mirror image copy — or clone — of the appropriate hard disk drives and store the clone in a secure location. Consult with outside counsel on this process — or a law firm with in house hard disk drive imaging capabilities to ensure that communications surrounding this are privileged.

For the outgoing Reagan administration, the duty to preserve electronic evidence lesson resulted in a protracted legal battle. And history may yet judge harshly the plan to destroy backup tapes containing Iran-Contra Affair e-mail. For SG Cowen, the lesson cost both the sting of a public relations black eye and a lot of money. If the current White House mishandles the electronic evidence connected to the illegal disclosure of the undercover CIA operative's identity, it will likely result more controversy or possibly criminal charges, either of which would erode the White House's credibility for handling this investigation.

The costs can be enormous. It isn't likely that there will come a time when employees no longer get their bosses or companies into trouble. The current business and legal climate suggests that little sympathy exists for companies and executives who fail to meet their legal duties, and outright condemnation for those that attempt to destroy evidence of their wrongdoing.

This too is not likely to change, so responding appropriately to

## WORKPLACE TIPS

### FOR EMPLOYEES:

- ▶ When using company e-mail, remember that your own actions, or those of the company or other employees around you, could mean that correspondence you think is private will instead become part of public trial evidence.
- ▶ Presume that all of your work e-mail and links to everyone you e-mailed could be made public in a lawsuit.
- ▶ Remember that just because you delete an e-mail doesn't mean it can't be recovered, sometimes easily.
- ▶ Your words in an e-mail could come back to haunt you, your company, your family and your friends. Choose them wisely.

### FOR EMPLOYERS:

- ▶ When you learn of a possible lawsuit, tell employees in writing, as soon as possible, to preserve e-mails. Keep a copy of this notice.
- ▶ Take immediate action with your computer services staff to prevent backup tapes from being reused, and have mirror-images, or clones, of employee computers created. Store the cloned copies and backup tapes in a secure location. Importantly, do not rely on paper copies of e-mail correspondence.
- ▶ Consult with an attorney on the above to protect your communications, allegations of employee misconduct — including preserving electronic evidence — is critically important. The last thing anyone needs when faced with an employee misconduct allegation is a stiff legal penalty or a loss of credibility.

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