



809 How to Manage Smoking Guns: the Ethical, Legal, & Practical Guidelines for Document Retention

Hanna Hasl-Kelchner
Associate General Counsel
Lorillard Tobacco Company

Bill Young
Senior Vice President, General Counsel and Chief Compliance & Risk Officer
Blue Cross & Blue Shield of Tennessee

Faculty Biographies

Hanna Hasl-Kelchner

Hanna Hasl-Kelchner is associate general counsel at Lorillard Tobacco Company, in Greensboro, North Carolina, where she serves as a member of its brand integrity group and is national counsel for Lorillard's trademark infringement litigation.

Her legal career began in Washington, DC, spanning private government practice and included service at the U.S. International Trade Commission where one of her cases was decided by President Reagan. Later, she moved to in-house practice, developing a diverse portfolio of increasing responsibility at Degussa Corporation, a subsidiary of Frankfurt based Degussa AG, and at Reichhold, Inc., a subsidiary of Tokyo based Dainippon Ink and Chemicals.

Ms. Hasl-Kelchner also serves on the advisory board of WeComply, Inc, and the editorial board of the Journal of Business Ethics Education. Her publications include, "The Business Guide to Legal Literacy: What Every Manager Needs to Know About the Law" (Jossey-Bass, 2006), a guide intended to promote more partnering between lawyers and their corporate clients and build on the interest in legal risk management sparked by Enronesque type scandals. Her writing can also be found in the ACC Docket: "Seven Ways to Eliminate Smoking Guns" (May/June, 1999), and "Marketing Compliance: How to Sell Your Company on Protecting Itself" (October, 2000). She is also a former adjunct professor at the Duke University Fuqua School of Management

She earned her undergraduate degree from Duke University, an M.B.A. from Cornell University, and her law degree from the Rutgers University School of Law - Camden, where she won awards for her advocacy skills.

Bill Young

Bill Young is the senior vice president, general counsel and chief compliance and risk officer for BlueCross BlueShield of Tennessee ("BCBST"), in Chattanooga, Tennessee. He reports directly to BCBST's CEO, and in his role as chief compliance officer is appointed by and reports to the BCBST board and audit committee. His responsibilities include providing legal counsel to the organization, as well as oversight of the corporate compliance program, the internal and external audit division, the legal division, corporate governance, and state and federal regulatory issues impacting BCBST.

Prior to joining BCBST, Mr. Young served as university counsel for Vanderbilt University in Nashville, Tennessee. While at Vanderbilt, he was responsible for legal matters involving TennCare, managed care contracting, government relations, workers' compensation, and general health-related issues. Mr. Young has also served as general counsel with the Tennessee Hospital Association, as the president of The Hospital Alliance of Tennessee, deputy commissioner of the Tennessee Department of Commerce and Insurance, and as senior counsel and assistant Attorney General with the Tennessee Attorney General's Office. Mr. Young was also in private practice with law firms located in Nashville and Washington, DC.

He currently serves on the board of directors of Park Center (Nashville) and the AIM Center (Chattanooga). Mr. Young is a member of the Tennessee Bar Association, American Health Lawyers Association, ACC, and the Williamson County Bar Association.

Mr. Young holds a bachelor's degree from Vanderbilt University and a law degree from Vanderbilt University Law School.



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Overview of Smoking Gun Challenges

		Legal Issues	Practical Issues	Ethical Issues
Smoking Guns	Content Issues	- More laws - More hot buttons	- Management Commitment - Effective policies & training	- "Bad" document, now what? - Misuse of communication channel, now what?
	Records Mgmt Issues	- <u>Andersen</u> - <u>Zubulake</u> - <u>Morgan Stanley</u>	- Management Commitment - Technology - Discovery Costs - Effective policies & training	- How much compliance do we need? - "Lost" records, now what?

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THE KEY TO MANAGEMENT COMMITMENT

**Show how good document creation
and retention is a BUSINESS issue.**

**Reframe as an operational issue
with legal and financial
consequences.**



THE KEY TO POLICY EFFECTIVENESS

**Instructive language
Effective training
Effective enforcement**



THE KEY TO EFFECTIVE TRAINING

**Develop employees' legal literacy
(know-how)
&
Create relevance for employees
(know-why)**



12 RULES EMPLOYEES NEED TO KNOW TO AVOID SMOKING GUNS

- 1: Stick to Company Business**
- 2: Keep it Respectful, Courteous, and Constructive**
- 3: Choose and Use Communications Channels Wisely**
- 4: Keep it Confidential**
- 5: Apply Legal Literacy**
- 6: Contribute Positively to the Value Chain**



12 RULES EMPLOYEES NEED TO KNOW TO AVOID SMOKING GUNS

- 7: Strive for Clarity and Accuracy**
- 8: Keep it Legal**
- 9: Keep it Ethical**
- 10: Listen and Respond to Warnings Responsibly**
- 11: Manage the Closure Process**
- 12: Manage the Document Retention Process Diligently**

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THE KEY TO EFFECTIVE ENFORCEMENT

- Management Commitment**
- Incentives**
- Consequences for non-compliance**

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REFRAMING THE LEGAL ISSUE AS AN OPERATIONAL BUSINESS ISSUE

- Bottom Line/ Quality Focus
(carrot)
- Doom & Gloom consequences of ignoring quality
(stick)



INCREMENTAL COMMITMENT

- Use legal audits to identify biggest exposures.
- Tackle those areas first.
- Achieve tipping point.



ULTIMATE GOAL

**Complete record that supports the
legal and day to day business needs**

AND

**A record that tells a story you can be
proud of.**



WHY IT MAKES BUSINESS SENSE

**Compliance is an investment
in good corporate citizenship**

It's a REPUTATION issue.



REFERENCES

ACC Virtual Library, www.acca.com/vl/ for sample policies

Brown, L., Gruner, R. and Kandel, A. *The Legal Audit: Corporate Internal Investigation* (Thomson West, 1994)

Hasl-Kelchner, H. *The Business Guide to Legal Literacy: What Every Manager Needs to Know about the Law* (Jossey-Bass, 2006).

Hasl-Kelchner, H. "How to Sell Your Company on Protecting Itself," *ACCA Docket*, 18(9), (October 2000), 54-71.

Tran, B. and Tomes, J. "Risk Analysis: Your Key to Compliance," *ACC Docket*, 21(10), (November/ December 2003), 54-71



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Bill Young

BlueCross BlueShield of Tennessee



What is BCBST?

- BlueCross BlueShield of Tennessee (BCBST) is a not-for-profit mutual benefit corporation. See Tenn. Code Ann. Section 56-29-101 et seq.
- BCBST is licensed by the BlueCross BlueShield Association as a Primary (or Parent) Plan, in Tennessee
- Based in Chattanooga, Tennessee
- 4,200 Employees
- Over 2.7 million members
- Over \$1.2 billion in paid claims
- Participates in 3 federal health insurance programs (Medicare, FEP, Medicaid)
- Has 3 state contracts to deliver health insurance benefits (state employees, TennCare, TennCare Select)



BCBST Corporate Compliance Program Goals

- Reinforce a corporate culture of integrity and ethical business conduct
- Implement a living compliance program by empowering management while establishing ownership, responsibility and accountability
- Integrate compliance into business processes
- Establish a knowledgebase including regulatory, contractual and ethical obligations



Best Practice Sources

- BlueCross BlueShield Association Guidelines (Members Only)
- Sarbanes-Oxley Act

<http://news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf>

- Federal Sentencing Guidelines

<http://www.ussc.gov/guidelin.htm>

- Health Ethics Trust (Best Practices)

<http://www.corporateethics.com/publications.html>

- CMS Compliance Program Guidelines

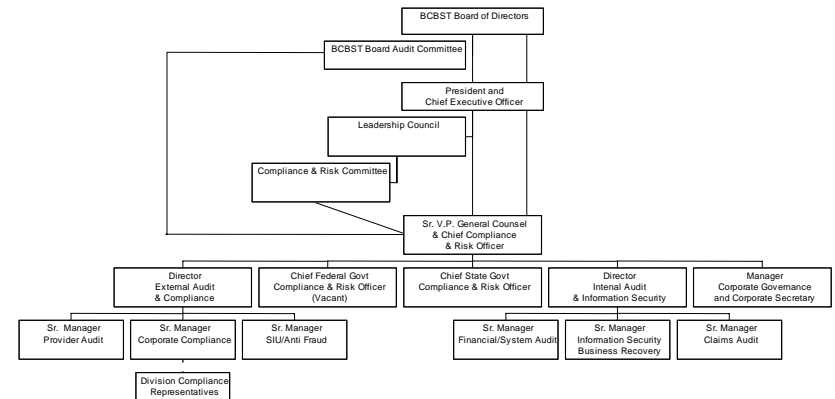
<http://www.cms.hhs.gov/medicarereform/contractingreform/compliance.pdf>

- Utilization Review Accreditation Commission (URAC)

<http://www.urac.org/>



BCBST Compliance Organizational Structure





Why Implementing and Enforcing Document Retention Standards Is Important

- In the case styled *In re: Telxon Corporation Securities Litigation, et al v. Price Waterhouse Coopers, L.L.P.*, 2004 WL 3192729 (N.D. Ohio), the magistrate judge recommended that the court enter default judgment against the defendant based upon PWC's repeated failure to produce requested records. The magistrate concluded that "unwinding" over three years of litigation to essentially start over, after PWC finally produced the records, would put an unfair burden on the plaintiffs. If the judge accepts the magistrate's default judgment recommendation, estimated damages against PWC will total \$139 million. Jonathan D. Glater, *Judge Finds Pricewaterhouse Withheld Data*, New York Times, January 12, 2005.

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Why Implementing and Enforcing Document Retention Standards Is Important (continued)

- In *Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 674885 (Fla. Cir. Ct.) the Court concluded that: "In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders...it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order...The prejudice to CPH from these failings cannot be cured...*The judicial system cannot function this way.*" 2005 WL 674885 at 9. As a consequence of those findings, the Court entered a partial default judgment against Morgan Stanley, ordered that an adverse inference instruction be read to the jury for purposes of determining if punitive damages should be awarded and awarded reasonable fees and cost to the plaintiff.

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The Wall Street Journal Recently Noted that Morgan Stanley Has Run Into a Number of Problems Over its Document Retention Efforts

- 11/02 is one of five firms that collectively paid regulators \$8.3 million for violating rules about retaining e-mail
- 7/13/04 averts a sex-discrimination trial by agreeing to pay \$54 million to settle claims; case features a dispute about e-mail
- 7/21/04 is fined \$250,000 for failing to produce documents in investor-complaint cases.
- 7/30/04 agrees to pay \$2.2 million to regulators to resolve allegations company delayed disclosing 1,800 customer complaints involving stockbrokers

Susanne Craig, Age of Discovery: *How Morgan Stanley Botched A Big Case by Fumbling E-mails*, The Wall Street Journal, May 16, 2005.



Zubulake Case

- In the widely reported case of *Zubulake v. UBS Warburg L.L.C.*, 2004 WL 1620866 (S.D.N.Y.) (“*Zubulake*”), the Court stated: “This decision addresses counsel’s obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client’s obligation to heed those instructions.” 2004 WL 1620866 at 1. The Court concluded that UBS had willfully destroyed potentially relevant information. It sanctioned the Company by ordering that: the jury be given an adverse inference instruction, UBS be required to pay the costs of any depositions or re-depositions conducted as a result of the late production of that information, and UBS pay all reasonable fees, including attorney’s fees, incurred by the plaintiff in connection with the motion for sanctions.



Zubulake Case (continued)

- Ultimately, on April 6, 2005, jury in Zubulake awarded \$29.3 million to the plaintiff, \$9.1 million in compensatory damages and \$20.2 million in punitive damages. Zubulake v. U.B.S. Warburg LLC, No. 1:02-cv-01243-SAS-GWG (S.D.N.Y. 2005).



Document Retention Resource Material

- **Judge Shira A. Scheindlin, Kathy Massey & Laura Ellsworth, Ten Tips for Electronic Discovery: Judge Shira A. Scheindlin Speaks on Proposed Rules Changes and Surviving E-Discovery Without Sanctions, 23 ACC Docket 1, pp. 56-76 (Jan. 2005)**
- **Pending Amendments to the Federal Rules of Practice and Procedure Awaiting Final Action (August 2005), www.uscourts.gov/rules**
- **ACC Website!!!! www.acca.com**



What Must A Records Retention Policy State?

- The fact that the content, not the form, of a record governs the applicable retention requirement (e.g. an electronic document is subject to the same retention requirements as a paper record).
- If and when the company may destroy paper records after conversion into an electronic form (see 15 U.S.C.A. 7001 and IRS Rev. Proc. 98-25).
- Whether employees may retain copies of records or if there is a central repository that can be accessed as needed (e.g. a contract database).
- Who may modify records, the procedures that must be followed to do so and what is done with previous versions of that document?
- Who is responsible for the destruction of documents at the end of the retention period and how is such destruction accomplished?
- What is the process to implement “holds” in the destruction process in response to threatened or pending Legal Actions? Are there other exceptions to the destruction procedures?
- What is the procedure related to the production or disclosure of potentially confidential, proprietary or privileged records?

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Record Retention Checklist

- Develop a comprehensive record retention policy
- If already developed, review and if necessary enhance record retention policy
- Develop central repository identifying all contracts (and amendments thereto) of company, location of such contracts, and person responsible for such contracts
- Standardize process for development and dissemination of all company policies
- Continuous education regarding record retention policy
- Audit internally to verify compliance with record retention policy
- Identify a “Records Manager” to oversee policy
- Create “Records Retention Committee” to ensure buy-in from all operational areas

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Policy Must Address Electronic Records

- **By 2005, corporations are expected to generate 17.5 trillion electronic documents annually. Other studies have found that 93 percent of all corporate documents are now generated electronically and that 70 percent of them will never migrate to paper.**
- **Discovery of e-mail has become a favorite target in litigation against businesses. In some cases e-mail becomes the “smoking gun.”**
- **Record retention policy accordingly must address electronic records**
- **Legal must work closely with company’s information systems area**



What Type of Storage Media is Discoverable?

- **DVD**
- **CD-ROM**
- **Hard Drive**
- **Laptop Computer**
- **Desktop Computer**
- **Zip Drive**
- **Floppy Diskette**
- **Backup Tapes**
- **Most other tape formats**



What are Some Examples of File Programs That Can Be Discoverable?

- Spreadsheet Programs
- Database Programs
- Word Processing Programs
- Presentation Programs
- Project Management Programs
- Computer Aided Design Program
- Programming Languages
- Multiple Image File Formats
- Vendor Software
- Meta Data
- E-mail Programs



What is Meta Data?

- **Meta data is a document's electronic properties and history. It can also include things that you deleted from the document but which are still contained in the electronic version.**



E-Mail “Smoking Guns”

- In Zubulake, a wrongful termination case, plaintiff obtained through discovery an e-mail saying she was too “old and ugly and she can’t do the job.”
- In investigation of Arthur Anderson’s role in Enron collapse, an Anderson assistant sends an e-mail to others on the Enron team stating “no more shredding” of Enron-related documents.
- In review of propriety of contracts between Boeing and United States Department of Defense, e-mails from government officials state, “We all know this is a bailout for Boeing” and “We didn’t need those aircraft” [from Boeing].
- In commenting on advocate group litigating with State of Tennessee on whether Medicaid program violates enrollees’ due process rights, Tennessee Finance Commissioner e-mails internally “To hell with the Tennessee Justice Center” [the advocate group].



Educate on E-Mail Policy

- **E-mails are for delivery of factual information, not a vehicle for resolving complex problems.**
- **Never put in an e-mail a statement that you would not want to see in the newspapers.**



Discussion ? Questions?

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