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# Benefits and Pitfalls Of Outsourcing Email Services

BY ROBERT A. BANNER AND SEAN SCUDERI

In recent years, companies, large and small, have moved away from maintaining their email servers in-house and have outsourced these services to third-party email service providers, also known as email hosting providers. Email hosting providers offer companies a wide array of appealing services, and they are growing in popularity. They assume management responsibilities for companies' emails, including maintenance, security, data storage, and backup. Email hosting providers offer counsel attempting to obtain documents an additional source of recovery and offer companies seeking to maintain documents a chance to customize retention policies to maximize compliance obligations. The purpose of this article is to highlight these opportunities and

potential pitfalls for counsel who may not be aware of them.

### Obligation to Produce

With the increased use of email in all areas of business, the volume of electronically stored information (ESI) generated by a company is tremendous. Email hosting providers can help keep a company's ESI organized, backed up, and archived in a secure and accessible manner. However, in the event a company reasonably anticipates litigation, it must remember one important principle: The ESI in the possession of its email hosting provider must be preserved and relevant portions must ultimately be produced.

Although New York courts have not expressly held that companies are obligated to produce those documents in the possession of their email hosting providers, it is a near certainty, based on the existing case law, that courts would compel such production if challenged. It is foolhardy to think that a company could skirt its obligations to



preserve ESI by simply outsourcing its email services to an email hosting provider.

Every litigator has received discovery demands requesting documents in his or her client's "possession, custody and control," a phrase that comes directly from CPLR 3120. The Court of Appeals has interpreted the "possession, custody and control" standard contained in the CPLR to mean constructive possession rather than strictly actual possession.<sup>1</sup> This interpretation allows for "discovery from parties that had practical ability to request from, or influence, another party with the desired discovery documents."<sup>2</sup> Based upon this decision, it is clear that any New York judge would hold

ROBERT A. BANNER is a partner and SEAN SCUDERI is an associate at Ingram Yuzek Gainen Carroll & Bertolotti.

that a party has an obligation to preserve and produce ESI in the possession of its email hosting provider.

### Choosing a Provider

When a company chooses to outsource its emails, it should be sure to choose an email hosting provider that best serves its needs, especially in the area of document retention and destruction. The most important information to understand in this regard is: (1) how often are emails backed up or archived, and (2) how long are backed up and archived emails preserved. Each email hosting provider may have different protocols, and certain email hosting providers allow companies to customize these services. We recommend companies consult with their IT professionals to understand the other practicalities involved, such as whether all ESI is backed up or just select portions and whether certain information is preserved for different periods of time.

Rather than just focus on the ease of services and costs, companies should make sure that satisfactory preservation policies are in place. Some factors that may impact how often ESI should be backed up and how long it should be preserved are industry regulations, the lifespan of business transactions or projects, contractual provisions requiring document retention, or potential threats of litigation. Companies in

litigious industries should inquire as to whether the email hosting provider is experienced with handling litigation hold notices and what mechanisms are in place to handle them (along with the associated additional costs). Customization options should continue to increase as the email hosting providers become even more sophisticated.

### Understand Policies

It is critically important that all employees understand their employer's internal document retention and destruction policies as well as those of the company's email hosting provider. A clear set of protocols for

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document retention and destruction will allow employees to understand what types of preservation and deletion activities should be upheld and avoided. Specifically, employees should be able to answer the following questions:

- Are there mechanisms in place to back up ESI? If so, how often are backups performed and how long are the backed up files retained?
- Are there policies in place preventing employees from deleting

emails or other ESI in violation of company policies?

- Is ESI routinely deleted after a certain period of time?
- Are their planned programs and resources in place to implement a hold on existing document retention and destruction policies if needed to preserve ESI?
- If an employee inadvertently or impermissibly destroys ESI, what steps should be taken and who should be notified?

Companies should take appropriate measures to ensure their document retention and destruction policies are clearly disseminated to employees. This education is best conveyed through training programs. If the policies are ever changed, a memo explaining the changes in plain English should also be circulated to employees. The employer can also host an informational seminar for his or her employees with the help of its IT professional or even representatives from the email hosting provider. Companies are also encouraged to test out the document retention and destruction policies to have a better understanding of how ESI is preserved and how documents may be recovered if deleted. The more knowledge and understanding employees have of these procedures, the less likely preservation issues will arise down the road. Finally, the better the procedures

in place, if a glitch occurs, a court is more likely to be sympathetic if some documentation cannot be retrieved.

### Litigation Hold Notices

Once a company reasonably anticipates litigation, a duty to preserve its documentation is triggered.<sup>3</sup> The Appellate Division, First Department, has explained that the reasonable anticipation of litigation is such time when defendants are on “notice of a credible probability that [they] will become involved in litigation.”<sup>4</sup> Once a company reasonably anticipates litigation, it has a duty to suspend its routine document retention and destruction policies and implement a litigation hold to ensure that all relevant documentation is preserved.<sup>5</sup>

If a company outsources its emails, it is not enough for the company to simply suspend its internal document retention and destruction policies. The company should also provide a litigation hold notice to its email hosting provider and request that all document retention and destruction policies in place regarding the company’s emails be placed on hold and all ESI be preserved.

Timing is key when it comes to establishing a litigation hold. If a company is late in implementing the litigation hold and potentially

relevant documents are destroyed, the company opens itself up to potential spoliation sanctions. A company’s use of an email hosting provider may actually help a company avoid such a scenario, depending on the backup and archiving policies in place. There is likely a period of time where deleted emails can be recovered by the email hosting provider if deleted by an employee. We were involved in a case where the defendant failed to implement a litigation hold and continued to delete emails on a daily basis.<sup>6</sup> The defendant sought to recover the deleted emails from its email hosting provider, but it missed its window of recovery.<sup>7</sup> Sanctions were assessed against the defendant.<sup>8</sup>

### Conclusion

When a client outsources its emails to an email hosting provider, make sure the client understands that it is obligated to produce all relevant ESI in the possession of its email hosting provider. It is critical that the client understands the obligations it has in anticipation of litigation also encompass its email hosting provider. Ideally, a company will be engaged in an ongoing dialogue with the email hosting provider, have knowledge of its document retention and destruction policies, and have mechanisms in place to provide a

litigation hold notice when necessary. Remember, a client can work with its email hosting provider to establish document retention and destruction policies that best suit its needs. Ignoring its obligation to preserve documents in the possession of its email hosting provider can subject the client to a litany of damaging and avoidable sanctions. Working with the email hosting provider should ameliorate many fears about document retention in the age of emails and allow clients to concentrate on their core business concerns.



1. *No. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62-63 (2013).

2. *Id.* (citing *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 146 (S.D.N.Y. 1997)).

3. See *VOOM HD Holdings v. EchoStar Satellite*, 93 A.D.3d 33, 38 (1st Dep’t 2012); *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

4. *VOOM*, 93 A.D.3d at 43.

5. *Zubulake*, 220 F.R.D. at 218.

6. *TIAA Global Invs. v. One Astoria Sq.*, 2016 N.Y. Misc. LEXIS 2419 (N.Y. Sup. Ct. Feb. 22, 2016).

7. *Id.*

8. *Id.*