

Lessons from the Quattrone Case – Containing E-mail Risk

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David Shub, Discovery and Records Management Director¹

Frank Quattrone personifies both the tech boom and the tech bust. In the 1990s, he rode the highs of the Internet boom on Wall Street. As a powerful investment banker with Credit Suisse First Boston (CSFB), Quattrone handled countless dot-com IPOs and drew a salary well over \$100 million. But it took just one ill-conceived e-mail – allegedly intended to cover up evidence in a federal investigation – to destroy his reputation and career and make him a federal convict.

Quattrone's three guilty verdicts in the federal prosecution for obstruction of justice and witness tampering² offer important lessons about e-mail use, record retention policies, and best practices in responding in the face of impending litigation. The basis for the charges: a single now-famous e-mail in which Quattrone wrote to his staff that it was "time to clean up those files." Aside from demonstrating that e-mail is a likely repository for "smoking guns," the conviction illustrates three important principles of record management in the electronic age: (1) the need to educate employees about proper e-mail use; (2) the need to design and implement effective record retention policies; and (3) the need to provide immediate spoliation advice to clients upon learning of impending litigation.

Employees must be educated as to the proper use of e-mail. As the Quattrone conviction illustrates, even e-mail that the author later claims was sent quickly, without much thought, and without any improper intent can later be used by a prosecutor to demonstrate all the elements of a crime – including the requisite *mens rea*. Despite Quattrone's protestations that he sent the incriminating e-mail among a flurry of others in a rush to get home for dinner,³ jurors found the e-mail sufficient proof of Quattrone's intent to destroy evidence and tamper with witnesses, especially after prosecutors were able to demonstrate that Quattrone had begun drafting the e-mail a day earlier.⁴ The truth may be that Quattrone did not actually intend to destroy evidence or tamper with witnesses and that his e-mail was innocuous, but powerful electronic forensics and discovery tools can uncover circumstantial – and sometimes even direct – evidence that points an accusing finger.

While it would not be unreasonable for an employer to presume that its employees always look to advance the interests of the company (and would not take actions to harm

¹ Formerly law clerk for the United States Court of Appeals for the Federal Circuit and securities litigation and banking attorney at the law firms of Wilmer, Cutler & Pickering in Washington, D.C., and Brooks, Pierce, McLendon, Humphrey & Leonard in Greensboro, N.C.

² See Randall Smith, *Quattrone Trial Yields Big Win For Government*, WALL ST. J., May 4, 2004, at A1.

³ See Randall Smith & Colleen Debaise, *Quattrone II: Banker Takes Stand in Retrial*, WALL ST. J., Apr. 28, 2004, at C1.

⁴ See Randall Smith, *Quattrone Trial Yields Big Win For Government*, WALL ST. J., May 4, 2004, at A1, A6.

those interests by improperly destroying documents), employers should realize that any employee is capable of negligently – or otherwise – abusing e-mail to the company's disadvantage. It is not enough to circulate a record retention policy that instructs employees on the proper use of e-mail. Rather, an employer needs to train every employee with access to e-mail (which most likely includes every employee) on the proper use of e-mail. In particular, e-mail should never – even jokingly – contain: any disrespectful comments about any person, any suggestion that an employee has engaged or should engage in an improper or illegal activity, any opinion about the propriety or legality of company or employee actions, or any thought or discussion that would be inappropriate if it were delivered to the recipient in printed form and then filed. Just like any hard-copy document, any e-mail is likely to be discovered by an investigating regulatory agency or opposing party. Employees, who are likely to treat e-mails similar to unrecorded casual conversations, must be taught that e-mails are actually written documents, more akin to formal memoranda, that must be drafted with careful consideration of the potential impact of any comments or information they contain. With appropriate training, Quattrone may have refrained from sending the unhelpful e-mail.

Record retention policies must be carefully designed *and* implemented. Quattrone's employer, Credit Suisse First Boston, had a retention policy that directed the destruction of documents, as appropriate. However, the retention policy was not part of a larger record management system that automated retention and destruction of documents, nor did the retention policy at least insist upon routine document destruction procedures to be carried out by uninterested record management personnel. Rather, CSFB apparently left the decision to destroy documents to each employee on an ad-hoc basis. Such a system is fraught with danger – unimportant and potentially harmful documents (such as Quattrone's e-mail) will likely be improperly retained, and relevant and therefore important documents (such as those that Quattrone may have been suggesting that his staff destroy) will likely be improperly destroyed. Establishing practices to prevent documents from being destroyed outside of established retention policy guidelines is critical to preventing improper document destruction. An automated record management system – or at least a system where the retention and destruction determinations are made by uninterested record management personnel, either of which prevents ad-hoc destruction of documents and instead subjects each document to the retention and destruction schedules of the retention policy, greatly diminishes the likelihood of retaining unnecessary and harmful documents and prevents the improper destruction of necessary documents.

Spoliation advice (that documents may not be improperly destroyed) must be provided quickly and disseminated widely as soon as the company learns of imminent litigation or regulatory agency investigation. In Quattrone's case, there is evidence that CSFB's general counsel's office failed to provide any such advice until after Quattrone sent his e-mail; furthermore, there is evidence that the advice was never provided to all employees.¹ To protect itself and its key employees, companies must take steps to ensure that all relevant employees are advised about their document preservation

¹ Kara Scannell & Randall Smith, *Quattrone Hits Back: Banker's Lawyer Scores Points, But He Doesn't Seem to Dent Friday's Damaging Testimony*, WALL ST. J., Oct. 8, 2003, at C1, C13.

obligations as soon as those obligations arise, so that they may refrain from doing anything that generates the appearance that they are improperly destroying or soliciting the destruction of documents. Corporate counsel and outside counsel for companies should have stock letters and e-mails that they can customize as appropriate and disseminate appropriately when document preservation obligations arise.

Smoking guns cannot always be eliminated lawfully. So it behooves a company to take reasonable precautions against their manufacture, and to take every legal opportunity to dispose of anything that looks like a smoking gun as soon as possible. In CSFB's and Quattrone's case, CSFB ended up paying a civil fine and the criminal investigation for the underlying acts was dropped, but Quattrone's e-mail led to a costly defense and ultimately to two obstruction-of-justice convictions and a witness-tampering convictions with maximum sentences of up to five, five, and ten years, respectively¹ (and a likely final total sentence of one to two years²). As the Quattrone case demonstrates, appropriate employee training, the implementation of a retention policy within a record management system, and the provision of appropriate spoliation advice will go a long way in preventing and eliminating unnecessary smoking guns, and preventing any consequential damage from those that must be left alone.

¹ Karen Freifeld, *Quattrone Found Guilty of Obstruction*, NEWSDAY, May 4, 2004, at A55.

² See Randall Smith, *Quattrone Trial Yields Big Win For Government*, WALL ST. J., May 4, 2004, at A1.