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Legal Issues in Records Retention and Disposition Programs

A records retention program traditionally has been developed to enable an organization to destroy valueless records at the appropriate time in order to free filing space, reduce staff requirements for handling and managing information, and speed retrieval of information. The records retention program must also ensure that valuable and legally required records continue to exist in the system and that the program protects the organization in case of litigation and government investigation. While some records must be kept for longer periods of time as a result of legal requirements, others can or should be destroyed at the earliest possible date in order to meet the best interest of the organization.¹

For many years, lawyers and accountants have advised their clients to maintain legal records permanently or indefinitely. They have argued that these records might be extremely important in case of litigation or government investigation. Since government regulations change periodically and are often difficult to research, records have rarely been destroyed with complete confidence that all legal requirements have been fulfilled.

In recent years, however, the volume of litigation in our court systems has increased substantially. With the changes and the relaxation of pre-trial discovery rules,² records are frequently subpoenaed during litigation and used to the advantage of the opposing party. An increasing number of cases are lost each year based upon records subpoenaed by the opposing party. Many of these records would not have been available to the other party if they had been destroyed under an established records retention program. Because of this, lawyers, accountants, records administrators and other professionals now have added incentive to recommend destruction of records which no longer must be maintained for legal or other purposes.

Components of a Legally Sufficient Records Retention Program

The procedures for developing a records retention and disposition program have been documented in a variety of different publications.³ In order for a records retention program to be legally sufficient, however, much more is required than merely ensuring that records are maintained for the period required by various statutes and regulations; proper procedures must also be followed in developing and operating the program. The following factors must be included in an overall records retention and disposition program.

1. *The records retention program must be systematically developed.* A records retention program is systematically developed if the program is developed in the ordinary course of business, the various records values have been properly determined, the program is documented, and the program has been properly approved. This requirement ensures that all retention requirements, including administrative, fiscal/tax, legal, research, and historical have been provided for in the program. It also establishes the fact that the retention program has been well conceived and executed over a period of time, rather than developed to deliberately destroy unfavorable documentary evidence prior to litigation or government investigation.

2. *The records retention schedules must cover all records, including all reproductions.* Records retention schedules which provide for only the original or "record" copy in paper form are inadequate to fully protect an organization. The "Uniform Photographic Copies of Business and Public Records As Evidence Act" (UPA), enacted by the federal government and almost all states, specifies that reproductions of records have the same legal significance as the original and may be used in place of the original for all purposes including evidence.⁴ Many records retention programs do not contain provisions for "information copies" or "personal copies" of records which may be maintained by one or many individuals in the organization. During litigation or government investigation, these copies may be subpoenaed and used against the organization, even though the original records were properly destroyed under the records retention schedule. Personal copies of records which were not destroyed may be particularly important during government investigations related to anti-trust or price fixing.

3. *The records retention schedule must also include provisions for records maintained on other media, especially microfilm and data processing media.* Most records retention schedules only provide for paper records. Some schedules specify when the records should be microfilmed and the original paper destroyed. Provisions should also be made in the records retention schedule to cover microfilm records. Rarely, if ever, should microfilm copies of business records be maintained "forever." Similar provisions should be made for data processing records, especially for original or back-up records which are periodically updated or replaced.

4. *Written approvals must be obtained for each records retention schedule and for the entire program.* Upon completion of each records retention schedule, one version of the schedule must be reviewed and signed by the department or section manager responsible for those records, the legal counsel, and the tax manager. In addition, the entire records retention program must be signed by the chief executive officer, attorney, and tax manager. These approvals again indicate that the records retention program was systematically developed in the ordinary course of business, instead of in anticipation of litigation or government investigation. Copies of these approvals should be kept indefinitely.

5. *Records should be systematically destroyed as specified by the records retention program.* Once a program has been approved, records should be systematically destroyed under the records retention program, in the ordinary course of business. Generally, the procedures should specify that, once each year, the records manager provide each department, the legal counsel, and the tax manager, with a listing of records that can be destroyed. After review, destruction can be halted for records related to litigation or government investigation, or for those which are still needed by the organization; other records can then be destroyed in an orderly basis at the designated time. Destruction of records in a haphazard or selective manner, even for records permitted under the retention schedule, creates the impression that the records retention program has not been properly implemented

6. *Program controls and management must be provided.* The records retention program will not function on its own. At least one person in the organization must be responsible for managing the records retention program to ensure that the program is up-to-date and that destruction proceeds in an orderly manner. This person should also be very familiar with the background and operation of the program in order to testify in court, if necessary, regarding the program.

7. *Procedures must be provided for the suspension of records destruction in case of foreseeable, pending, or actual, litigation or government investigation.* When the organization receives a notice of pending or actual litigation or

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government investigation or it appears reasonably foreseeable that such litigation or investigation will take place, the destruction of records must cease immediately. Otherwise, the company could be liable for obstruction of justice, contempt of court, or other problems discussed later in this article. Generally, any staff member who receives any information regarding potential litigation or government investigation should inform the legal counsel or chief executive officer immediately. Notice should then be provided to the records manager, all records custodians and other related personnel to immediately cease the destruction of all records, since it is often initially unclear which records will be involved. As more information becomes available to legal counsel or the tax manager, permission may be granted for the destruction of certain records under the program which are outside the scope of the litigation or investigation. The legal counsel and tax manager should be involved in approving all "Request for Destruction of Records" forms in order to facilitate this process.

8. *Documentation relating to the development and implementation of the records retention program, including records retention schedules, procedures, changes in procedures, approvals, legal research, and listings of records destroyed must be maintained.* Documentation related to the records retention program is necessary to prove the existence of a systematic operation of the program. The records which document the development of the program, original signed retention schedules, and listings of records destroyed, are critically important as evidence to indicate that the records in question were destroyed in the ordinary course of business. The records manager will generally be required to appear in court with the appropriate documents and testify as to the development and operation of the program.

The record of legal research performed is important to indicate that the organization used its "best efforts" to comply with any retention requirements. Since some legal requirements are extremely difficult to locate or interpret, an organization can easily and inadvertently neglect to provide for some requirements. A government agency, in particular, will be less likely to impose harsh consequences on an organization when presented documented proof that it tried to comply with the law. While "ignorance of the law" is no defense for failure to comply with the law, "inability to locate some statutes or regulations after a reasonable research effort" might prove to be a satisfactory defense.

Types of Legal Requirements

There are various types of legal requirements and guidelines which must be considered as part of a records retention program. Each type of legal requirement is briefly described in section below.

Statutes. Laws enacted by Congress or state legislatures are published as statutes. Statutes, however, contain very few records retention requirements.

Rules and Regulations. Government regulatory agencies are empowered under statutory law to promulgate rules and regulations which have the force of law. Federal rules and regulations are published daily in the Federal Register (FR) and compiled annually in the Code of Federal Regulations (CFR).⁵ The rules and regulations must be published in the FR or CFR to put the public "on notice" before they can be enforced. State regulations may be available from private publishers within a state, adopted by legislatures as state statutes, or distributed on request by the agency. On both the federal and state level, however, some guidelines and procedures are not published and must be requested from the respective agency.

"Contingent rights" provisions found in rules and regulations specify the conditions under which a right may exist. Rather than being a legal requirement, the contingent right provision establishes a new right where one does not otherwise exist, provided that certain requirements are met. For example, the Federal Trade Commission will presume that a mail order business has failed to comply with time requirements for shipment of merchandise to buyers, if the business fails to have records or other documentary proof establishing the use of systems and procedures which facilitate compliance with the regulation.⁵ Under those circumstances, the business bears the costly and time-consuming burden of proof to prove compliance with the regulations. If appropriate records are kept, the Federal Trade Commission would bear the burden to prove failure to comply.

Statutes of Limitations / Limitations of Actions. "Statutes of limitations" or "limitations of actions" may be found in statutes or regulations. Many myths have resulted from the concept of limitations of actions or statutes of limitations. The limitations of action period does not prescribe a records retention period. Instead, the limitations of actions prescribes a time period during which an organization or individual can sue or be sued on a matter, or a time period during which a government agency can investigate or audit. For example, if a business is harmed because another organization breaches a contract, in most states the business will have six years from the time of the breach to bring a law suit. After the six year period, the business loses all rights to sue for the breach of contract. While the business may want to keep some records related to the contract during the period specified by the limitations of action, there is no legal requirement to retain those records.

Each organization must develop its own strategy for handling limitations of actions problems. Traditionally, most attorneys have advised their clients to keep all records in case of litigation. With the large increase in discovery and records subpoenaed by opposing parties, however, some attorneys are now advising their clients to destroy records much earlier under an approved records retention program. Clients may be advised to keep records for the entire limitation of actions period if they will be the likely plaintiffs (they will likely sue the other party) and to destroy records at an earlier date if they will be the likely defendant (they will likely be sued by another) and the other party has little proof in its possession. Of course, records should not be destroyed at the point litigation becomes foreseeable or the organization might suffer some of the consequences discussed later in this article.

Judicial or Administrative Opinions. When a dispute arises between individuals or between an individual and the government, a judicial or administrative proceeding may result. Judicial or administrative opinions (which interpret existing law) are generally binding for cases involving similar fact situations. Few opinions, however, involve legal requirements for records.

Letter Opinions. An individual may request a ruling from an agency in a particular matter. If the agency issues a letter opinion to the individual, the opinion is binding on the individual and establishes the relative position of the agency vis-a-vis the individual. The individual can negate the letter opinion only by filing for a judicial or administrative review which overturns the agency's view. A letter opinion is generally not binding on other individuals (unless converted to a published rule or regulation), but may represent the position the agency will generally take in similar circumstances.

As a practical matter, it is rarely advisable to request a letter opinion from an agency regarding records retention requirements, since many agencies interpret the law very restrictively. In the absence of a specific records retention requirement or a prohibition against a particular action, an organization is free to develop the program or take an action in good faith. Once a letter opinion is received, however, the organization is generally bound not to deviate from that opinion.

Legal Research

Generally, legal requirements are determined by lawyers or paralegals performing legal research within the legal information systems. As a practical matter, however, records managers will often be required to perform the initial legal

research and present their findings to legal counsel for review. Additional details on legal research is provided in the article "Legal Status of Microfilm and Duplicate Records" [020-3020-00].

Most large companies will have a law library that contains many of the materials necessary to perform legal research for records retention purposes. Alternatively, most major cities and state capitols will have law libraries that are available to the public for research purposes. Records managers should become familiar with the legal resources available in their communities. Publications, such as *Finding the Law: A Workbook on Legal Research for Laypersons*,⁶ and law librarians can help educate the records manager in the precise techniques involved.

While some legal requirements can readily be found using standard legal research methods, other requirements are difficult, if not impossible, to find for even the most experienced researcher. A variety of research methods are generally required to find the relevant information.

Procedures for Approval of Legal Requirements in a Records Retention Schedule

Some special procedures should be followed in developing the legal requirements section of the records retention program. This is particularly important if the legal research has been performed by a layman, particularly one who has little previous experience in legal research. The following procedures are recommended:

1. *Review research procedures with attorney.* Prior to compiling the legal requirements for the records retention program, the researcher should meet with the organization's legal counsel to review the procedures to be followed in compiling the appropriate regulations. In some cases, many of the research materials might already exist in the organization. In addition, the attorney can be helpful in directing the research, establishing policy, and answering questions on how to use the research tools.
2. *Identify Basis for Legal Requirements.* Prior to beginning research, the researcher should consult with staff within the organization to determine which regulatory agencies may have to be consulted to determine retention requirements. In most cases, staff has already had some contact with the appropriate agencies and may in fact have already acquired some published materials related to records retention requirements. In conjunction with the development of the entire records retention program, the researcher should also identify the types of records found in the organization in order to determine the scope of the legal research.
3. *Locate Legal Requirements.* The various index and research materials should be reviewed to locate relevant statutes, regulations, and other retention requirements. Researchers should initially scan the text of any legal requirements located to determine the relevance to the records retention program. During the course of research, the researcher may encounter some legal requirements for records, such as reporting requirements, that do not affect records retention; these other requirements should be noted for use later. Since state regulations are rarely available in law libraries, the researcher may be required to send letters to state agencies which may have developed rules and regulations which affect the organization's records. Most major public libraries maintain a directory of state agencies which includes agency name, director, and address. The letter to the agency should specify that the organization wishes to comply with the state requirements and requests the agency's assistance.
4. *Reproduce Full Text of All Legal Requirements.* After the requirements have been reviewed in terms of relevance for records retention purposes, the requirements should be reproduced and arranged by legal citation. It is generally appropriate to either underline or highlight the specific sections which deal with records retention requirements.
5. *Prepare a Legal Requirements Index.* After the research is complete, an index should be prepared indicating the following types of information:

- Jurisdiction: state or federal
- Source of Information: regulation, agency, etc.
- Research Date (to indicate how current the requirement)
- Type of Records Affected
- Retention Periods
- Citations
- Comments

This type of index can be prepared on many word processors using the list processing or records processing capabilities. The index can then be sorted by type of record affected so that all legal requirements related to a specific type of record will appear together in the index.

6. *Relate Legal Requirements to Specific Records.* The legal requirements related to specific records should be transcribed from the index and incorporated into the general records retention schedule, under a column heading "Legal Requirements". When two or more legal requirements are specified, the longest legal requirement should generally be selected. The citation for the legal requirements should also be included in the records retention schedule to enable the organization to revise the retention schedule should legal requirements change.
7. *Provide Legal Requirements for Attorney Review.* When the records retention schedule is ready for review, a copy of the retention schedule, index of legal requirements, and reproductions of all legal requirements should be presented to legal counsel for review. By presenting all the legal research in this manner, the legal counsel can quickly determine whether the research is complete and accurate, and can start developing confidence in the research performed.
8. *Retain Legal Research.* The legal research materials including the index and reproduction should be maintained indefinitely as a record of the procedures followed in performing the research.

Consequences of a Records Retention Program That Fails to Meet Legal Requirements

The preceding sections specify the procedures that should be followed to produce a records retention program that meets legal requirements. In order to justify the time and expense for meeting legal requirements, it is important to understand the potential impact of a records retention program that fails to meet legal requirements. The consequences can be catastrophic to an organization.⁷

Loss of Rights. When records are unavailable because of improper destruction or even failure to maintain these records in the first place, an organization may lose certain rights which it otherwise may have. For example, if Company A does not have the records to prove that Company B owes it \$5,000, then it will be difficult and probably impossible to win a lawsuit to compel Company B to pay. In addition, many tax laws and other government regulations require proof of certain actions or compliance in order to receive favorable treatment. In the absence of the appropriate records, the organization may suffer harsh consequences.

Loss of Time and Money. Records provide an efficient means to prove one's case in litigation or government investigation.

Without records, the organization may still introduce witnesses to testify. Testimony, however, is often more time consuming and expensive, and sometimes less credible than records. In addition, when employees must testify, they may spend many hours away from work.

Obstruction of Justice. Individuals or organizations responsible for the deliberate destruction of documents when litigation or government investigation is foreseeable, pending, or in progress may be held liable for obstruction of justice.⁸ State and federal laws are somewhat unclear as to the exact meaning of "foreseeable" in determining whether one is liable under the obstruction of justice statutes. Some decisions have indicated that in order to be convicted, the individual must possess a specific criminal intent. Other decisions indicate that the individual's intent is irrelevant if the act results in interference with a judicial process. Still another court decision indicates that the defendant need only have knowledge or belief that the successful destruction of documents would likely thwart a judicial proceeding.⁹ Even if destruction of documents does not, in fact, obstruct the proceeding, the individual may still be liable for obstruction of justice by performing the acts of destruction alone.

The major issue related to obstruction of justice is whether the particular proceeding was foreseeable or not. In order to reduce the chances for criminal prosecution under the obstruction of justice statutes, an organization should stop destruction of records at the slightest hint of litigation or government investigation. After more careful review, some records may then be destroyed without the risk of criminal penalty.

Contempt of Court. The individual or organization may be held in contempt of court by disobeying a court order, including a subpoena to produce records ("Subpoena Duces Tecum"). Contempt of court is committed whenever a court or administrative tribunal (with subpoena powers) orders documents produced and the party defies the order by deliberately destroying requested documents. Penalties may include imprisonment and fines.

Adverse Inference in Litigation. In litigation between two parties, certain presumptions or inferences may arise when relevant records have been destroyed. Corpus Juris Secundum, an encyclopedia and summary of the law, presents this rule of evidence as follows:

- The unexplained and deliberate destruction of relevant documentary and other evidence or the manipulation or alteration of such evidence, gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoiler . . . The inference arising from the destruction of evidence ordinarily will not dispense with the necessity for the introduction by the other party of some secondary evidence as to the contents of the documents . . . it merely diminish the force of the spoiler's evidence and enhances the probative value of [the evidence produced] by his opponent . . . When evidence is willfully destroyed, the court will view the evidence presented in the light most unfavorable to the wrongdoer . . . The inference cannot operate when there is positive evidence of the contents of the instrument destroyed, and it is, like other inferences, ordinarily rebuttable by satisfactory explanation . . . An unfavorable inference can arise only against one who actually destroyed or was privy to the destruction of the evidence, and only in cases where the destruction or mutilation was in bad faith for the purpose of suppressing evidence. No unfavorable inference arises when the evidence was lost, destroyed, or mutilated by accident or without the fault of the party in possession of it.

[Footnotes omitted].¹⁰

It is critical that an organization establish controls to cease the destruction of all documents when a judicial proceeding or government investigation is foreseeable, pending, or in progress. The destruction of any documents relevant to a court proceeding may give rise to the adverse inference. The inference may be rebutted, however, by evidence indicating that the destruction of records was performed under the retention program without any intent to destroy potential evidence. If the judicial proceeding or government investigation was foreseeable, pending, or in progress when the records were destroyed, even if destroyed under an approved records retention program, the organization may still be held accountable.

Establishing the Records Retention Program in Court

When records have been destroyed under an existing records retention program, the organization may have to produce evidence in court or before a government agency to prove the existence of the records retention program and to prove that records were destroyed under the program in the ordinary course of business. If the program has been properly developed and operated, the procedures for establishing the program will be relatively simple.

In order to establish the existence of the program and produce evidence that the particular records were destroyed under the program, the records manager or records custodian may be called to testify as a witness and normally should bring the following materials to the proceeding:

- Work papers and work sheets documenting the development of the records retention program
- Signed approvals for the retention schedules and the entire program
- The description and the listing of all records destroyed over time, including the specific records dealing with the proceeding
- The records management manual, including modifications which existed at the time the particular records in question were destroyed

The records manager or records custodian should explain the procedures followed in developing the records retention program and produce copies of the appropriate documentation if requested. The description and the listing of all records destroyed is essential to prove that records have historically been destroyed in the ordinary course of business and that the records in question were treated like all others destroyed under the program. The records manager or records custodian must be familiar with all aspects of the records retention program development and operation.

Summary

Many organizations develop a records retention program to free up valuable space, reduce personnel time and cost, and to speed retrieval and handling of information. In recent years, the concerns related to litigation and government investigation have influenced the development of new programs and enhancement of others.

The records retention program must meet the legal records retention requirements in order to prevent serious hardship to the organization through criminal penalties and fines, loss of rights and money, and adverse inferences at trial. As a practical matter, the records manager in many organizations will often be responsible for researching legal retention requirements related to the records retention program; legal counsel will then review and approve the research.

Many of these retention requirements are extremely difficult to locate and analyze. In order to safeguard an organization,

however, the entire records retention program and the specific retention requirements should be developed in a systematic manner. In the event that some legal requirements were inadvertently omitted from the records retention program, the organization can then show that it made a serious, good faith attempt to comply.

¹ See *Procedural Standards for Developing and Operating a Records Retention and Disposition Program*, Records Retention Subcommittee, Standards Committee, Association of Records Managers and Administrators, 1985. This report provides guidelines for records managers on how to develop a records retention program.

²"Discovery" is the legal process by which one party to a legal proceeding obtains information relevant to the case which is in the possession of the other party, generally through court order. In the area of records, the court will generally issue a "Subpoena Duces Tecum" ("Order to Appear and Produce Documents"). The records manager may be given responsibility to respond to the subpoena under direction of the company's legal counsel.

³ See *Records Retention Scheduling, Technical Report No. 1*, Association of Records Managers and Administrators, 1980; Wilmer O. Meadke, Mary F. Robek, and Gerald F. Brown, *Information and Records Management*, Glencoe Press, Beverly Hills, CA, 1974; Dr. Betty R. Ricks and Dr. Kay F. Gow, *Information Resource Management*, South-Western Publishing Co., Cincinnati, OH, 1984.

⁴ The "Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)" or substantially equivalent statutes have been enacted by the federal government (28 USC 1732) and most states. See 13 Uniform Law 453.

⁵ See 16 CFR 435.1(a)(4), Mail Order Merchandise.

⁶ See Al Coco, *Finding the Law: A Workbook on Legal Research for Laypersons*, S/N 024-011-00148-4, 1982 available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; see also J. Myron Jacobstein and Roy M. Mersky, *Fundamentals of Legal Research*, The Foundation Press, Inc., 1977, Mineola, N.Y.

⁷ See John M. Fedders and Lauryn H. Guttenplan, "Document Retention and Destruction: Practical, Legal and Ethical Considerations", *The Notre Dame Lawyer*, Volume 56, Number 1, October 1980.

⁸ For federal obstruction of justice statutes see 18 USC 1503 (Influencing or Injuring Officer, Juror, or Witness Generally); 18 USC 1505 (Obstruction of Proceeding Before Department, Agencies, and Committees); 18 USC 1510 (Obstruction of Criminal Investigations).

⁹ See Fedders, *supra* note 9, pp. 28-30.

¹⁰ See *Corpus Juris Secundum*, The American Law Book Company, Brooklyn, NY, 1983; 31A C.J.S. Evidence 153, pp. 388-390 for full description and citations to numerous state and federal cases addressing the issue of adverse inferences at trial for destruction of records.