Trucking Law

- Punitive Damages
- Road Rage
- U.S.-Mexico Cross-Border Program
- And more!

page 6

ALSO

Electronic Discovery

page 40
Formulating a Records Retention Policy

The cost of defending a lawsuit often increases due to the existence of old records—that is, records that need not exist if they had been properly destroyed under a formal records retention program. An organization’s goal should be to retain only those records needed to conduct business, comply with the law, and meet reasonable needs for the preservation of archival documentation. Good business practice is to destroy all other records systematically under a formal records retention policy based on retention periods that can be demonstrated to be reasonable under the circumstances. Absent any laws or regulations mandating a specific retention period, or any actual or probable litigation or government investigation, disposal under a reasonably formulated retention policy is both appropriate and cost-effective.

Presented here is a synopsis of some of the best practices with respect to records retention periods for records that may become material in future litigation, as well as a basic overview of the numerous factors that should be considered by an organization seeking to formulate a records retention policy, including the nature of the records to be preserved, federal and state statutes and regulations, statutes of limitations, and whether litigation is probable.

Preliminary Considerations in Formulating a Records Retention Policy

The Sedona Principles

The Sedona Conference is a non-profit organization that has developed a set of “best practices” guidelines for electronic discovery. See The Sedona Conference Working Group Series, The Sedona Guidelines: Best Practices & Commentary for Managing Information & Records in the Electronic Age (2004), available at (http://www.sedonaconference.org/content/miscFiles/RetGuide200409.pdf). The five “best practices” set forth in these guidelines are as follows:

- Thomas M. Jones is a member of Cozen O’Connor. He is vice chair of the firm’s National Insurance Department and is in the firm’s Seattle office. Mr. Jones also serves as chair of the firm’s Electronic Discovery Practice Group. Matthew D. Taylor is an associate attorney in the Insurance Department of Cozen O’Connor’s Seattle office. His practice includes insurance coverage analysis and litigation, civil litigation defense, and appellate litigation. David O. Stephens, CRM, FAI, is vice president of records management consulting at Zasio Enterprises, Inc., a leading records management company based in Boise, Idaho.
An organization should have reasonable policies and procedures for managing its information and records.

An organization’s information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.

An organization need not retain all electronic information ever generated or received.

An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.

An organization’s policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with the preservation obligations related to actual and reasonably anticipated litigation, government investigation or audit.

These best practices can serve as a general foundation for any organization’s records retention policy.

Statutory and Regulatory Retention Requirements

One preliminary question to be answered in formulating a records retention policy is whether the retention of any particular type of document is mandated by statute or regulation. While a detailed analysis of the thousands of provisions of federal and state law regarding preservation of records is beyond the scope of this article, there are three general factors that should be considered.

First, for some records, no statute or regulation directly prescribes how long the record must be retained. In such cases, organizations typically establish a retention period consistent with the expiration of the value of the records for business purposes. Second, precise retention periods for some types of records are set forth in federal and state statutes and regulations. Where applicable, these retention periods constitute a minimum period of retention. Third, many records are subject to statutory or regulatory retention requirements that do not specify a precise retention period. Of the some 20,000 retention requirements in the U.S., perhaps one-fourth do not specify the requirement in terms of a definite period of time.

Statutes of Limitation

Another important consideration for an organization seeking to formulate a records retention policy is whether a particular statute of limitation will be relevant to any records retained by the organization. Although statutes of limitation do not directly impose records retention requirements, they are important because they specify how long a party has to file a claim. Thus, statutes of limitation tend to provide some guidance regarding how long business records may be of legal significance. Where applicable, the length of time specified by a statute of limitation constitutes an absolute minimum for retention of records likely to be used in actions to which the limitation applies.

Contracts. Where an organization’s business is such that it can expect possible lawsuits that will involve breach of contract claims, the organization must consider the statutes of limitation for contract actions in its jurisdiction when formulating a retention policy. The period of time during which a breach of contract claim may be brought varies widely depending on the type of contract and the jurisdiction, and can range anywhere from three to twenty years. The typical statute of limitations for claims on most written contracts is six years.

Torts. Many organizations face significant exposure from tort claims arising out of their businesses. As with contract claims, the period of time during which tort claims may be brought varies widely depending on the tort and the jurisdiction, and can range from one to ten years. Although the typical statute of limitation for a negligence claim is three years, most jurisdictions permit application of the “discovery rule” in tort claims. That rule provides that the statute of limitation does not begin to run until the claimant knew or should have known about his or her injury.

Statutory claims. Where a cause of action is authorized by a state or federal law, a statute of limitation is frequently built into the law. For example, this is the case in claims involving copyright actions. 17 U.S.C. §507(b).

The retention guidance discussed here consists of general principles associated with the retention of common corporate records. It must not be taken to constitute legal advice. Organizations are obliged to arrive at their own judgments concerning the retention of any and all records they own, based on a careful assessment of laws and regulations, business requirements and other factors.

Types of Records

In addition to considering relevant laws, regulations, and statutes of limitation, an organization seeking to formulate a records retention policy should evaluate the nature of the records it needs to preserve. For a comprehensive discussion of records retention programs, and specifically, electronic records, see Roland C. Goss, Hot Issues in Electronic Discovery: Information Retention Programs and Preservation, 42 Tort Trial & Insurance Practice Law Journal 797 (Spring 2007).

Records of Transitory Value

Records of transitory value include documents such as duplicates, drafts, and working papers. For such records, organizations often apply retention periods shorter than three years, and in the case of duplicates, drafts, and working papers, retention periods of one year are often assigned. Additionally, retention policies frequently authorize disposal of such records immediately when they have been superseded by newer versions of documents, or upon completion of the projects to which they relate.

Health Care Records

Federal regulations promulgated under the Health Insurance Portability & Accountability Act of 1996 (HIPAA) require health care providers to preserve and protect various electronic health care records for at least six years after the date of creation of the record. See C.F.R. 45 §164.316(b)(2)(i).

Records of Investment Companies and Advisors

Under the Investment Company Act of 1940, investment companies must maintain and preserve records, defined as “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents[,],” see
15 U.S.C. §78c(a)(37), for “such period or periods as the [Securities and Exchange] Commission... may prescribe as necessary or appropriate.” Id., §80a-30(a). Likewise, investment advisors are required to preserve such records for time periods specified by the SEC, 15 U.S.C. §80b-4. The SEC has further specified the nature and types of records to be maintained and preserved by investment companies and advisors in 17 C.F.R. §270.31a-1, and it has set forth specific retention times for various type of records in 17 C.F.R. §270.31a-2. For most specified documents, the minimum retention period is six years. Id.

Records of Securities Broker-Dealers

Securities broker-dealers may be required to retain records such as blotters, ledgers, and ledger accounts by several different governmental entities, including (1) the SEC, see 15. U.S.C. §78q(a)(1); 17 C.F.R. §§240.17a-3–240.17a-25; (2) the National Association of Securities Dealers, see NASD Conduct Rules 3010–11; and (3) the New York Stock Exchange. Under SEC regulations, retention periods vary depending on the record, but broker-dealers are required to retain many for “not less than six years.” 17 C.F.R. §§240.17a-4(a), (b), and (c).

E-mail

Frequently, when a so-called “smoking gun” is found among the records of an organization during pre-trial discovery, it is an e-mail message. This can likely be explained by the differential effort between creating an e-mail and drafting a traditional letter. The very act of writing a letter, with its formality and intellectual and physical dimensions, forces the author to be thoughtful, contemplative, and careful in wording and construction. Business letters and office memoranda frequently evolve through multiple drafts, the end result of which is a relatively meticulously constructed document. By contrast, most e-mail messages are casual, spontaneous, and conversationally informal. Although these characteristics tend to make e-mail the penultimate goal of discovery, the large majority of e-mails of any given organization are of very limited retention value.

Another obvious and crucial difference between paper records and e-mails is that storage of e-mails requires much less physical space. Given the large volume of e-mails sent and received by most organizations on a daily basis, however, archival storage, management, and retention of e-mail can be a difficult problem.

In view of the foregoing, an effective record retention policy may include daily management of e-mail for each and every employee, coupled with a stringently enforced uniform maximum retention period applied to the entire retained message store. Based on these principles, the following are attributes of an effective e-mail retention policy:

- E-mail storage within the messaging environment should be restricted for daily communications only; long-term archival retention of e-mail should occur only in storage repositories dedicated for that purpose.
- Generally speaking, e-mail should not be saved unless there is a legitimate business reason for doing so. Employees should be encouraged to delete e-mail of transitory value daily.
- All messages not deleted during daily cleanup routines should be subject to a uniform maximum retention period, which should occur in a separate repository outside the messaging environment. Common options for this retention period range between three and seven years, depending on the nature of the organization’s business.
- Regarding a maximum retention period, 10 years tends to be the longest retention period for e-mail. This is because within a 10-year period, it is likely that an organization will change and upgrade its messaging technology, which may render the older legacy messages unreadable.
- This maximum retention period should be effectuated by automatically migrating e-mails from the messaging environment to a dedicated e-mail archival retention repository. Thus, all e-mails (irrespective of content) remaining in employee mailboxes after a specified time period (typically 30, 60 or 90 days) will be automatically archived to the designated repository, where they will remain for the duration of the maximum retention period, and after which they will be automatically destroyed, unless destruction is suspended due to a litigation hold.
- For any e-mails that are required to be retained in excess of the maximum retention period, they should be saved in another software system or printed out and filed in a paper-based recordkeeping system.
- Backup of e-mail from the servers should be for business continuity purposes only, not long-term archival retention. Thus, the backup retention should be equivalent to that applied to the messaging environment itself—typically 30, 60, or 90 days.

Financial Records

The Sarbanes-Oxley Act. The Sarbanes-Oxley Act of 2002 contains two separate mandates regarding records retention periods for accountants and auditors. First, the Act requires that “any accountant who conducts an audit of an issuer of securities... shall maintain all audit or review workpapers for a period of five years from the end of the fiscal period in which the audit or review was concluded.” See 18 U.S.C. §1520(a)(1). Second, the Act mandates promulgation of a rule requiring that public accounting firms “prepare and maintain for a period of not less than seven years, audit work papers, and other information related to any audit report in sufficient detail to support the conclusions reached in [an audit] report.” 15 U.S.C. §7213(a)(2)(A)(i).

Tax Records. The prevailing practice regarding retention of tax records and supporting documents has been to keep such documentation for a period of seven years. For some tax-related records, including financial statements, books of account, and other summary financial records, organizations often retain them...
for considerably longer than seven years, sometimes permanently.

**Records Requiring Longer Than Average Retention Periods**

The issue of records retention where litigation is probable is of greatest concern for businesses that manufacture products that are subject to failure in performance, or which may be harmful to the environment or to the health of consumers and the general public. For these types of records, retention requirements tend to be longer than the norm of three to seven years.

**Product Design and Development Records.**

For many engineered or industrial products, as well as drugs and drug devices manufactured by pharmaceuticals firms, companies generally retain many types of product design and development records for the commercial life of the product plus a period of years thereafter (generally ranging between five and fifteen years). During this time frame, litigation is highly likely in cases where the products fail in performance or result in harm to the health of consumers. In these types of cases, where products enjoy a long life in the commercial marketplace, retention periods can frequently be tantamount to permanent. However, product testing and inspection records, i.e., records that document the quality of products during the manufacturing process and prior to introduction into the stream of commerce, are typically retained for shorter periods of time. Retention periods ranging from three to seven years after product testing and inspection are complete are common. Where a product is subject to warranty, records needed in the administration of warranty claims are generally retained for the life of the warranty, plus some period of time thereafter.

**Environmental Records.** As a general principle, companies owning environmentally sensitive properties and facilities are obliged to retain in perpetuity records showing the environmental status of the property, including records documenting the remediation of pollution or other environmental damage. This is because, even though a property owner may divest itself of such land or facilities, the liabilities associated with ownership often never fully extinguish. In other words, companies owning environmentally sensitive properties are obliged, indefinitely, to defend their stewardship of them. Other environmental records, however, are frequently disposed of after relatively short retention periods. These include reporting records as well as records documenting the disposal of non-hazardous wastes. Retention periods of three to 10 years are common for these types of records.

**Employee Health and Safety Records.** Federal Occupational Safety and Health Administration (OSHA) regulations provide that, with respect to employees who are exposed to hazardous substances in the workplace or who have suffered long-term health
effects from conditions of employment, companies must retain records of such exposure, employee medical records, material safety data sheets, and other related records, for a minimum of 30 years. Records documenting exposure to some hazardous substances must be retained even longer—40 years or duration of employment plus 20 years, whichever is longer. See, e.g., 29 C.F.R. 1910.1018(q), 1910.1044(p). Such retention requirements are of course, tantamount to permanent. For companies having no involvement with hazardous substances in the workplace, records documenting the safety of the workplace, including accident and injury records, are typically retained for a minimum of five years. This period of retention is generally sufficient to address the statutes of limitation for personal injury discussed earlier.

Additionally, employers in more than 20 states are required to follow the state’s OSHA plan, rather than the federal OSHA. Federal OSHA regulations provide that state plans must require employers to retain records for at least as long as each federal OSHA regulation requires. Thus, if the employer lives in a state that has its own OSHA plan, state regulations must be reviewed to determine if retention requirements are even more stringent or differ in other ways from the federal requirements.

Finally, state government employees are not covered by federal OSHA regulations, and, therefore, are not subject to the same record retention requirements as private employers. State agencies must look to state law to determine what, if any, record retention requirements apply to the health and safety records of state government employees.

Retention Periods Where Litigation Is Actual or Probable

The Duty to Preserve Records

The duty to preserve records arises when a party has notice that the records will be relevant to litigation. The duty clearly arises when the organization has actual knowledge of litigation, for example, when a complaint has already been filed. The duty can also arise, however, where an organization should have known that certain records would be relevant to future litigation. Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

A mere possibility of future litigation, however, has generally been held to be insufficient to trigger the duty to preserve records. See Goss, supra, at 813. This is because litigation may be “possible” where in fact it is highly unlikely to be commenced.

Similarly, no duty will arise where there is “merely a potential for litigation.” Lekkas v. Mitsubishi Motors Corp., 2002 WL 3163572 at *2 (N.D. Ill. Sept. 26, 2002). In Cache La Puente Fees, LLC v. Land O Lakes, Inc., 2007 WL 684001 (D. Colo.), the court held that “a party’s duty to preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent.” Otherwise, a potential litigant faces the “intractable dilemma” of incurring costly storage expenses or risking a spoliation claim. Id. at *9. In Frey v. Gainey Transp. Svcs., Inc., 2006 WL 2443787 at **8–9 (N.D. Ga.), the court held that the plaintiff would not be allowed to make an “end run” around discovery rules by sending a pre-suit document retention demand letter.

Some courts have resolved this issue by holding that a preservation duty is triggered where litigation is pending or “reasonably foreseeable.” See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). The tests applied include assessments of probability and reasonableness. See, e.g., Anderson v. Sotheby’s Inc. Severance Plan, No. 04 Civ. 8180 (S.A.S.) 2005 WL 2583715 (S.D.N.Y. Oct. 11, 2005) (duty to preserve arises when litigation is “likely”).

A better reasoned standard is that the duty to preserve attaches when litigation is already pending or when an actual, specific threat of litigation renders a suit “probable.” Under the American Bar Association’s Civil Discovery Standards, an attorney should inform the client of its duty to preserve potentially relevant documents when he or she “learns that litigation is probable or has been commenced.” AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, CIVIL DISCOVERY STANDARDS, STANDARD No. 10 (2004), available at www.abanet.org/litigation/discoverystandards/ 2004civildiscoverystandards.pdf. A probability-based standard, if employed as part of an organization’s records retention policy, appropriately avoids the costs of retention of duplicative and transitory records where litigation is unlikely.

One court has suggested using the standard for anticipation of litigation under the work product doctrine as an analytical tool to determine when litigation is reasonably foreseeable. Samsung Electronics Co. v. Rambus, Inc., 439 F. Supp. 2d 524, 542 (E.D. Va. 2006). The work product doctrine applies when the document is “prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.” National Union Fire Ins. Co. of Pittsburgh, PA v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (emphasis in original); see Fed. R. Civ. P. 26(b)(3). Courts may require different “probabilities of litigation” before allowing a party to assert work product protection, such as litigation being “identifiable,” a “substantial probability,” or “real and imminent.” See APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 12 (1980) (noting standards when work product doctrine will apply in various jurisdictions).

Scope of Preservation Duty

Once the duty to preserve is triggered, the scope of documents an entity is required to preserve must only be those that are reasonably calculated to lead to the discovery of admissible evidence. Zubulake, 220 F.R.D. at 217. This does not mean every document must be retained.

Just as organizations need not preserve every shred of paper, they also need not preserve every email or electronic document, and every backup tape. To require such broad preservation would cripple entities which are almost always involved in litigation and make discovery even more costly and time-consuming. A reasonable balance must be struck between (1) an organization’s duty to preserve relevant evidence, and (2) an organization’s need, in good faith, to continue operations.

Id.; see also THE SEDONA PRINCIPLES: SECOND EDITION, Best Practices Recommendations & Principles for Addressing Electronic Document Production, Principle 5 & Comment 5.a (The Sedona Conference® June Retention, continued on page 67

46 • For The Defense • January 2008
Retention, from page 46
2007). A company should not be required, for example, to preserve all e-mail communications that might be relevant to some nonspecific future litigation. See Concord Boat Corp. v. Brunswick Corp., 1997 WL 33352759 at *5 (E.D. Ark. Aug. 29, 1997).

Case Law Regarding Retention Periods
Where Litigation Is Probable
Where litigation is probable, the question is: what is an appropriate length of time to retain relevant records? As set forth above, a variety of factors apply, including laws and regulations, the nature of the record, and statutes of limitation, but the guiding principle is that an organization’s records retention policy must be reasonable in light of the circumstances of each case.

Some courts have held that when retention periods were devised, the person designing the procedure knew or should have known that a particular type of record had a high probability of being used in litigation. This knowledge may be imputed to the organization. Consequently, a retention period that is too short can be the basis of an inference that the organization acted in bad faith and was motivated to dispose of unfavorable evidence. For those types of records that have a history of being required in litigation to which the organization is a party, the retention period may need to be quite lengthy—that is, until the organization’s decisionmakers consider that it has no further liability for the business matters reflected in the records.

Not all types of records need to be retained for an extended length of time, however. For example, in Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988), the Eighth Circuit held that “a three-year retention policy may be sufficient for documents such as appointment books and telephone messages, but inadequate for documents such as customer complaints.” Id. at 1112. The court further stated that “if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved.” Id.

In Stevenson v. Union Pacific Railroad, 354 F.3d 739 (8th Cir. 2004), a case involving a train-car grade crossing accident, the trial court held Union Pacific had improp-