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Nuts and Bolts of Creating a Records Retention Schedule

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I. INTRODUCTION AND LEGAL REQUIREMENTS FOR RECORDS RETENTION PROGRAM

There is no cookie-cutter approach to creating an effective document retention program. A sound policy must be tailored to fit the specific needs of the business involved and should have legitimate business purposes at its core. Rather than any desire to purge an occasional “smoking gun” from its files, the compelling reasons for businesses to adopt an appropriate document retention program should be considerations of storage space and the administrative cost of searching through hundreds of boxes full of documents or massive electronic files to locate information.

Having a legitimate business purpose underlying the program is key, as prosecutors in the Arthur Andersen case demonstrated. Andersen’s written policy of retaining records sufficient to support or defend its audit, while destroying e-mails and other non-essential documents, was not unique in its industry. An Andersen partner testified that the firm’s document retention policy was aimed at ensuring work paper files are complete and fully supported, and unnecessary confidential client documents are destroyed. Under cross-examination, however, he admitted the policy was used a tool to keep potentially harmful documents away from plaintiffs’ lawyers and other parties adverse to Andersen and its clients. Given this testimony, Andersen’s document retention program was found to have “amounted to an institutionalized policy of destroying any documents whose discovery by outsiders could place the firm in a bad light.” The lesson to be learned from Andersen is this: No policy will shield a corporation where the primary purpose of its document retention program is merely to eliminate documents that might be harmful to the company. Rather, businesses must consider the business purpose for retaining or destroying a document, rather than the content of the document (whether good or bad).

There are several important considerations in crafting an appropriate document retention program. First, the program must be tailored to and result from the legitimate business needs of the company to retain certain documents. Second, the legal and other regulatory requirements of the industry and jurisdiction in which the business (or particular business unit) operates must be reviewed and incorporated into the records retention schedules. Indeed, documents should not be retained for periods beyond their usefulness to the company or beyond the legal requirements for their retention.

While Illinois courts have not yet articulated the exact requirements of a reasonable and appropriate document retention program, a source for useful insight into such standards is the Eighth Circuit's decision in *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988).¹ There, the defendant attempted to avoid an adverse inference by showing that certain reports had been destroyed pursuant to a records retention policy providing for the destruction of such records after three years if no action regarding the records had been taken during that period. However, the appellate court was unwilling to conclude that a records retention policy will automatically prevent an adverse inference from being drawn. Instead, the court held that before a records retention policy will prevent an adverse inference, the following factors must be considered:

First, the court should consider whether a record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. For example, the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention period policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints. Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaint have been filed, the frequency of such complaints, and the magnitude of such complaints.

The Eighth Circuit in *Lewy* further indicated that the purpose of a records retention policy must not be limited to the destruction of potentially damaging evidence. Moreover, the policy must take into account the need to preserve documents beyond their ordinary retention period in the event of investigations, litigation, or similar occurrences. On this point, the court stated the following:

Finally, the court should determine whether the document retention policy was instituted in bad faith. In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to [allow an adverse inference.] Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under particular circumstances certain documents should have been retained notwithstanding the policy. For example, 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. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.

The standard articulated in *Lewy* was recently applied in *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739 (8th Cir. 2004). That case arose after a vehicle was hit by a train at a grade crossing. During the course of discovery, the plaintiff requested that the defendant railroad produce copies of tapes of conversations between train crew and dispatcher at the time of the accident. The tapes, however, had been destroyed pursuant to the railroad's routine document retention plan. The federal district court entered sanctions against the railroad for its destruction of the tapes.

¹ *Lewy* has been cited with approval by Illinois federal courts. See *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, *38 (N.D. Ill. October 20, 2000); *In Re: Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, No. MDL-817, 89 C 8082, 1991 WL 279005, *3 (N.D. Ill. Dec. 26, 1991).

On appeal, the Eight Circuit affirmed the lower court's imposition of sanctions against the railroad. The Appellate Court reasoned:

The district court's bad faith determination is supported by Union Pacific's act of destroying the voice tape pursuant to its routine policy in circumstances where Union Pacific had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury. While these are quite general considerations, an important factor here is that a voice tape that is the only contemporaneous recording of conversations at the time of the accident will always be highly relevant to potential litigation over the accident. We conclude that this weighs heavier in this case than the lack of actual knowledge that litigation was imminent at the time of the destruction. Additionally, the record indicates that Union Pacific made an immediate effort to preserve other types of evidence but not the voice tape, and the district court noted that Union Pacific was careful to preserve a voice tape in other cases where the tape provided to be beneficial to Union Pacific. The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident.

Stevenson, 354 F.3d at 748.

The *Lewy* and *Stevenson* cases demonstrate that a records retention program should (1) systematically develop the program; (2) adopt a program that covers all records, including reproductions; (3) include provisions for records maintained on other media; (4) identify appropriate procedures for obtaining written approvals for all records retention schedules; (5) strictly adhere to the policy that is instituted; (6) articulate appropriate control and management provisions; (7) provide for the suspension of document destruction where litigation is imminent; and (8) retain all documentation relating to the development and implementation of the program itself.

There are two types of records retention programs: general and specific. Under a general program, all records of a company are subject to the same procedures and guidelines. A specific program, in contrast, creates different procedures for retaining records according to their subject matter. For example, records relating to antitrust matters would be handled as part of the company's antitrust compliance program, and documents relating to product quality and safety would be handled in conjunction with a company's products liability program.

A combination of both general and specific approaches frequently will be necessary in formulating an overall program, particularly for large corporations with a wide variety of records. The precise manner in which the program is divided will therefore vary according to each business.

II. DESIGNING THE RECORDS RETENTION PROGRAM

The method and order in which a records retention program is developed and implemented will vary from organization to organization, depending on such factors as the level of management support, status of the existing records policies and procedures as well as budget constraints.

Whether or not the following procedures are adopted or an alternative method is used, the records retention program must be custom designed to meet the particular needs of a business. Generic records retention

schedules are commercially available. However, generic schedules should be used only as a reference and a rough guide, and should not be used without being customized to meet the company's unique requirements.

A. Resources

- 1. Literature.** Literature on records retention is available in most business libraries and through numerous records-management organizations.
- 2. Organizations.** The Association of Records Managers and Administrators ("ARMA") is a group of records and information managers, archivists, corporate librarians, imaging specialists, legal professionals, knowledge managers, consultants, and educators. ARMA is a not-for-profit association serving more than 10,000 information management professionals in the United States, Canada and over 30 other nations. ARMA has a Chicago chapter. Information on ARMA is available at www.arma.org. ARMA publishes its own journal that contains articles on subjects related to records management. It also publishes numerous technical publications and conducts workshops to assist records and information management professionals.
- 3. Products.** Many products and services are available to companies, such as computer programs and off-site storage facilities, to improve and facilitate records storage.

B. Departments and Personnel Involved. The creation and implementation of a program generally involves attorneys and often is done by lawyers. The corporate team selected to create the document retention program should be charged by top management to study the entire company and develop a comprehensive and effective records retention program. One approach is to assemble a team of experienced managers representing administration, finance, legal and operations. Of course, the list of personnel will vary widely depending on the composition and size of the company, the degree of existing program development, available resources and the manner in which the program is developed.

When designing a program, the personnel involved must remember that the success of the records retention program depends upon striking the appropriate balance between records needed to run the business and the cost of their retention and destruction. Expenses associated with the physical and electronic storage must also be considered. For example, the costs of and inconvenience to employees in locating and reviewing relevant documents in response to an adversary's discovery request is another significant consideration.

- 1. Records Manager.** After the records retention program has been developed, maintaining and auditing the program often is handled by a company's finance, accounting or legal department. Ideally, one person should be in charge of the program, with authority to carry out the program. This person is often referred to as the records manager.

The records manager typically will be responsible for or involved in the following tasks: (1) identifying and classifying the company's records; (2) assisting in the creation of and maintaining the records retention schedule; (3) ensuring that the records retention schedule has been reviewed and approved by the appropriate legal, fiscal and management personnel; (4) acting as a liaison and providing assistance to the records retention committee and the

department records coordinators; and (5) coordinating the records retention program within the company's overall records management systems, including active records filing, inactive records transfer and storage, archiving and historical preservation, and microfilm.

2. Records Retention Committee. The records manager should also involve others by obtaining broad support for the program, which will ensure the program's success and to assure that the program meets the company's needs. Depending on the size and complexity of the company, these goals may be further ensured by establishing a records retention committee. The records retention committee should be representative of the company's decision makers, and may include personnel such as a company's records manager, in-house legal counsel, fiscal officer, archivist, accounting manager, auditor and controller. The committee should meet to review, recommend changes, approve the recommendations of the records manager, oversee periodic audits of the program, and consider the suspension of the automatic destruction of documents under the program when necessary and appropriate.

3. Department Coordinators. The majority of large corporations and business entities are organized into departments or divisions that operate somewhat autonomously. To develop and operate an effective records retention program, a records retention coordinator should be selected from each department or division to work directly with the company's records manager. The coordinators should review all records in the department, transferring records from active to inactive storage when appropriate, and coordinating the destruction of the department's records.

4. Attorneys and Other Specialists. In addition to the records manager, specialists should be consulted for particular types of records or special problems. Tax, securities, patent, pension, real estate, environmental, Occupational Safety and Health Administration (OSHA), Equal Employment Opportunity, labor, and litigation lawyers are only a few of the specialists who may be involved in implementing the program.

C. Preliminary Procedures and Activities. Assuming the company is starting from scratch or fairly close to it, certain preliminary tasks should be undertaken before starting to design a records retention program. These initial activities are to:

1. Determine what, if any, records controls exist and the personnel involved;
2. Review any current records retention schedules, policies, procedures, internal audit reports, organizational charts, information regarding the types and categories of the company's records, and available statistics on records use;
3. Develop a realistic action plan to design, develop and implement the records retention plan, including costs, priorities, time schedules and staffing requirements;
4. Determine the necessary departments and personnel involved, as well as the nature and scope of the documents; and

5. Generate a memorandum to circulate to the appropriate decision makers within the company explaining the problems or deficiencies with the company's current policies or procedures, suggesting the creation of a new, comprehensive records retention program, outlining the rationale for the new program and describing the action plan to implement the new program.

III. DEVELOPING AND IMPLEMENTING THE RECORDS RETENTION PROGRAM

- A. Categorization and Records Inventory.** Companies should first examine and determine the records that are currently being retained and develop categories into which each document or group of documents can be organized. Statutes and regulations that impose records retention requirements may offer an effective means of identifying convenient categories. These factors will often be determined by the type of business being conducted by the company.

In addition to those records retained to comply with legal obligations, records considered vital to the operation of the company should also be examined. These types of documents often include contracts with customers, product designs, customer lists, production records, supplier contracts, and documents of title.

Routine documentation generated during the course of business constitutes the largest body of documents. Because these documents have only fleeting value and are neither legally controlled nor considered vital, their retention is difficult to regulate. Most companies find it useful to categorize documents along departmental or functional lines, rather than by broad descriptions of documents or their subject matter.

To determine what records are being generated and retained, one of the first steps is to design and conduct a records inventory. The inventory identifies the organization's records needed to determine records values and retention schedules. The inventory also provides useful information for developing the active filing system and other components of the total records management program.

First, an inventory form must be developed. Many variations of such forms have been used successfully. The form should be flexible enough to account for new documents and circumstances and complete enough to provide the information necessary to design the appropriate retention schedules. The following information is typically requested in the inventory form:

- title, description and form number, and record series (if any) of the document;
- record type (single or recurring document);
- location of the record;
- size and dimensions of the record;
- date(s) of the record;
- category classification (vital, archival or operational);

- person or group responsible for maintaining the records;
- suggested retention period;
- record media (paper, microfilm, magnetic disks or tapes, etc.); and
- whether the document is an original or copy; if it is a copy, the location of the original.

Testing the inventory form should be undertaken by conducting an inventory of representative records of one department or division of the company. The form should be modified as appropriate. Next, when the inventory form is finalized, establish a schedule of the departments to be inventoried.

B. Conduct Interviews of Appropriate Company Personnel. In conjunction with or after the completion of the records inventory, appropriate personnel from each of the company's departments or operational divisions should be interviewed. The interview process will provide more subjective information related to records use and requirements. This information is important in determining various retention periods.

The department records coordinator, department heads and other individuals who are frequently involved in the department's records management should be interviewed. It is also useful to select individuals with a cross section of perspectives and experiences, so that the final records retention schedule adequately reflects the needs of the company. Clerical staff and secretaries often provide valuable insight into the company's documents and suggestions for the records retention program.

In addition to reviewing and addressing any issues stemming from the records inventory forms, an interview should cover the following topics: (1) what does the interviewee like about the current records retention system; (2) what are the deficiencies with the current records retention system; (3) what changes should be made to the existing system; (4) what recommendations does the interviewee have for making such changes; (5) are there any special or unusual problems or documents that arise within the department and division; and (6) what recommendations does the interviewee have related to specific retention periods.

C. Create a Records Retention Worksheet. The information obtained from the preliminary information gathering stages, records inventory and interviews should be assembled and organized for analysis to prepare the records retention schedules. One means of organizing such information is through the use of a records retention worksheet. Although not all of the information from the prior records inventory and interviews will be included in the worksheet, the worksheet should contain the information described above in connection with the records inventory form. Additional information should be noted on the worksheet, including the period during which each record series is active, the point in time when the records become inactive, and the total period of time necessary to meet the operational, legal or fiscal requirements of the company.

D. Establish Retention Periods. After the records retention worksheet has been completed, the overall retention periods must be established for each series or type of record. A records retention program should establish retention periods that span the useful life of the documents. Statutory and regulatory retention periods can identify the useful life of some documents. Documents that relate to a potential

or pending cause of action may require a retention period that mirrors the appropriate statute of limitations.

The various statutes of limitations are part of the legal framework on which a good records retention policy is structured. However, a statute of limitations does not necessarily dictate any specific records retention period. Certain records may remain important long after a specific statute of limitations has expired. Further, companies that operate in different states will be faced with different statutes of limitations, making it difficult to have a records retention program that was based on local statutes of limitations even if that were desirable.

Some documents possess useful lives beyond or apart from a statute of limitations. Companies should examine the document classifications identified under their program and create retention periods designed to reflect the realities of their business. Retention programs are not established only in response to legal obligations but also to facilitate the efficient operation of the business. The key question for resolving the problem of retention periods is whether the cost of retention justifies the benefit of having the document at some unknown later date.

The records retention schedule must set forth the period that the series or types of records must be retained before destruction. The schedule may also provide for the time frames in which these records will be maintained in the active filing and the remaining time of the retention period in which the records will be placed in inactive storage.

E. Destruction Procedures. Records should be destroyed in the normal course of business after the retention period has expired. Records should be disposed of in a controlled, supervised environment. Most records can be destroyed in the most cost effective manner, such as through the garbage or hauling them to a disposal site or recycling center.

Additional precautions must be taken with respect to the destruction of a relatively small number of records that are confidential or proprietary. Those records should be destroyed by shredding or pulping to ensure that the information is totally obliterated.

The date of the destruction of records should be recorded. The record of destruction should be retained to show the systematic destruction of the documents and to explain the destruction procedures if the information is needed in connection with subsequent litigation or government investigation.

F. Suspending Destruction. Companies should suspend the document destruction when legal action or government investigation is imminent or pending. Destruction of documents deemed relevant to an imminent or pending investigation or litigation may result in criminal charges of obstruction of justice or the imposition of an adverse evidentiary inference. These sanctions may even be assessed in cases where the documents are destroyed in accordance with an established records retention program and in the ordinary course of business. Therefore, it is important that a records retention program incorporate policies that flag such documents and exempt them from destruction.

G. Auditing the Program. Once a program has been designed and implemented, the company must conduct regular, systematic reviews of active and inactive records storage and the destruction of documents. Audits are essential to assess the effectiveness and the degree to which the various

departments and operating units are complying with the program. Audit results should be used to develop and modify the program to reflect more efficient ways to accomplish its goals.

The audit consists of comparing those documents that were scheduled to be destroyed or transferred under the records retention schedule with those records that were actually destroyed or transferred. The audit also should examine whether documents were destroyed prematurely because records should be destroyed only at the time specified in the retention schedule.