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Records Retention In E-discovery and Litigation Environments

By

David O. Stephens
Vice President for Records Management
Zasio Enterprises, Inc.

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David O. Stephens

is vice president for records management consulting at Zasio Enterprises, Inc., a leading records management company. Mr. Stephens has over 30 years of experience in the field and has developed or improved records management programs for more than 200 corporations and government agencies throughout the United States. His most recent book is *Records Management: Making the Transition from Paper to Electronic* (ARMA International, 2007). He also co-authored the book *Electronic Records Retention: New Strategies for Data Life Cycle Management* (2003), which is the standard reference work on that subject. Mr. Stephens is a Certified Records Manager, and was inducted into the Company of Fellows of ARMA international in 1992. This article is based on a paper the author prepared for the conference *E-discovery and Records Management: New Litigation Challenges*, held at Fordham Law School. He can be reached at dostephens@zasio.com.

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IT, records management, and legal personnel need to work together on process and procedures to make records retention work.

HOW SHOULD retention periods be devised for records that have a good probability of being subject to discovery and used in litigation? Perhaps the best way of introducing the importance of this topic is to cite some observations of U.S. senator Patrick Leahy. Commenting on the Arthur Andersen case, Senator Leahy wrote that “As a former prosecutor, I know that no matter how egregious the crime, you can’t prove a case without the evidence.” In organizational life today, the job of writing rules prescribing how long records—potentially legal evidence—are retained falls to records management specialists, working in close concert with lawyers. These retention rules must be designed in a manner that renders them legally sufficient should they come under scrutiny during the course of e-discovery or litigation. This article prescribes some recommended principles and practices for achieving this objective. The issue of records retention in e-discovery/litigation is perhaps 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 or the general public. Today, however, no organization is immune from these risks.

PART 1: RECORDS RETENTION WHEN LITIGATION IS PROBABLE

• Let's begin with one of the cardinal principles of records retention where litigation is concerned: Depending on how things work out, records in litigation can be a blessing or a curse. In other words, any particular record can be favorable or unfavorable to the organization's case. This being the case, as a general rule of thumb in a litigation-intensive environment, the fewer records the better. Although there are exceptions, this is true much more often than not. In litigation, it's not the records you no longer retain that cause the most problems, it's those that remain. If an organization no longer retains a certain record and that record is requested as evidence during legal proceedings, the organization must merely justify why that record no longer exists. If, on the other hand, the record still exists and is requested, it must be produced as evidence and its contents must be defended if they become at issue during the proceedings. In general, attorneys can more easily defend the absence of documents that have been properly and systematically destroyed under an established retention policy than they can defend the information content of existing records.

To reiterate, the "bottom line" is this: In discovery/litigation, it's not the records that have been routinely and properly discarded that cause the most problems, it's those that still exist. Thus, from a litigation risk avoidance perspective, the goal should be to retain only those records needed to conduct business and comply with the law. All other records should be systematically disposed of under retention policies that are as short as possible. The remainder of this article discusses some practical methods of achieving this.

Two Golden Rules Of Retention In Litigation

Let's now turn to issues related to establishing retention periods for records that may become material in future litigation or other legal proceedings.

In situations where litigation is probable, should the retention periods for records that may encounter use in litigation be longer or shorter? Is it better to retain the records for longer periods of time, in situations where it is believed that they will be favorable or "exculpatory" to the organization in such actions? Or, if it is believed that the records may be harmful or even incriminating to the organization, would a shorter retention period be in the organization's best interest? To answer these questions it is necessary to state the two Golden Rules of retention decision-making.

1. Retention Periods Must Be Reasonable Under The Circumstances

Assuming all retention periods are fully compliant with all applicable statutes and regulations, the next most important thing is that they be formulated such that they can be defended as reasonable from both business and legal points of view. To meet the test of reasonableness, retention periods should be not too long and not too short. This simple yet often elusive principle is the foundation for records retention policies that may come under legal scrutiny. The balance of this article is about how to do this.

2. Retention Periods Must Avoid Any Inference Of Bad Faith

This means that, when the retention periods were devised, the organization knew or should have known that a particular type of record had a high probability of being used in litigation. Thus, if the retention period was set too short, it could be inferred that the organization acted in bad faith as it was motivated to rid itself of evidence that may be, in future litigation, unfavorable to its defense. In other words, absent statutory/regulatory mandates to retain them, organizations may feel at liberty to rid themselves of older records, but in situations where litigation is probable, the retention periods