Cutting legal expenses

How to develop a document retention plan

Interviewed by Roger Vozar

It takes time and money to create a document retention plan, but it's even more costly to wait until litigation is pending to determine how to get needed information.

"The work done on the front-end will help protect the company. It's not something every company has, but it's something every company should have," says Kerri L. Keller, a partner with Brouse McDowell, LPA.

"Companies may shy away from creating a document retention plan because they don't want to spend the money up front. It can take a lot of time and effort."

But when one email server could have 30,000 or 40,000 emails, it can be quite expensive to pay someone to sift through everything to find relevant documents.

Smart Business spoke with Keller about the importance of a document retention plan.

Kerri L. Keller
Partner
Brouse McDowell, LPA

What is a document retention plan and why does a business need one?

A document retention plan is a policy that provides for the systematic review, retention and destruction of documents. A business needs one for numerous reasons, but primarily to reduce the cost associated with document production during litigation, assist in complying with laws requiring the preservation of certain documents and to facilitate access to records.

How does a business draft a document retention plan?

First, identify which documents are important. These are usually employment records, accounting and corporate tax records, and legal records, but can also be business-specific documents, such as invoices and order forms. Key documents are often stored on computer hard drives, or consist of things like emails and Web pages.

The next objective is efficiency. It's not feasible for a company to retain every electronic document and email created, so the key is to have a plan. The policy should also be developed with an eye toward minimizing costs should the company be involved in litigation.

How does the lack of a document retention plan impact a company during litigation?

Electronically stored information is a major contributor to the cost of discovery in litigation. When documents are produced in litigation, they must be reviewed by counsel prior to being presented to the other side. Companies with inefficient policies may have inflated legal costs attributed to this. For example, if there is a lack of a central corporate repository, information can be spread across servers and backup tapes. Duplication increases the time and expense of reviewing documents. If there is a lack of a corporate policy, irrelevant information can be saved, which again, leads to expense in reviewing documents. Likewise, if critical documents are mingled in with less critical documents, or personal documents mixed with business documents, costs in reviewing them can increase. A policy serves the function of mitigating risks, reducing costs and improving access to records.

How does a business implement a document retention plan?

A business must first identify and categorize the universe of documents. It must then consider what categories of documents are essential and relevant. Certain state and federal laws set forth the time that some documents are required to be retained. The policy must enable a business to locate records quickly and effectively, ensure that records can be protected when needed for examination or litigation, and allow for nonselective destruction of documents once retention needs are met. The plan should be reduced to a detailed document and followed.

When a business is sued, or considering a lawsuit, it must implement what is called a 'litigation hold.' A litigation hold stops the routine destruction of documents that might contain relevant information. It's OK for documents to be destroyed in the routine course of business. It is actually preferable, as each unnecessary and obsolete record can be used by an adversary. Records are generally assets only as long as they are needed. Once litigation is threatened, or contemplated, the routine destruction of documents must be stopped. A litigation hold is the process used to advise employees of their obligation to preserve records and suspend the company's document destruction process.

When and how should a litigation hold be issued?

The duty to preserve arises when a party knows, or reasonably should know, that a suit is about to be filed, when a suit is filed, when a discovery request has been made or when a court issues a discovery order. It can arise before a complaint is filed, such as when a demand letter is sent by an adversary.

The litigation hold notice should be disseminated by either senior management or the company's legal department. It should be someone who commands the recipient's attention — not an assistant. It should be sent to all individuals who will be directly involved, such as those who are likely to have relevant documents and knowledge of the facts, as well as any document custodians. The relevant persons must be directly contacted. Both the notice to the recipient as well as the recipient's acknowledgement of receipt must be documented. The notice must be broad enough to catch all documents, but specific enough to provide guidance.

What are the consequences if the litigation hold is not followed?

The consequences can be severe. Spoliation occurs when documents are destroyed or not preserved in a pending or reasonably foreseeable action. The penalties can include the cost of recreating the information, an instruction at trial that the missing information would have been beneficial to the adverse party, the exclusion of favorable expert testimony, a judgment against the party that spoliated the evidence, monetary sanctions and even criminal sanctions. While it takes work to create a document retention plan, the work is worth the effort. <<

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