

STRAIGHT TALK ABOUT RECORDS RETENTION

Many companies have policies setting forth the manner in which documents and records are retained, stored and ultimately destroyed. Companies can, and do, destroy documents as part of their ordinary course of business. A document can be destroyed at any time, provided, that at the time of destruction there is no duty to preserve the document.

A “duty to preserve” can arise because of a contractual obligation, a regulatory requirement, or when the property in question is, or could be, evidence in a current, pending, or reasonably foreseeable lawsuit, regulatory action or governmental investigation.

If the destruction of a particular record is called into question, a company will want to demonstrate first that no duty to preserve existed, that the destruction was not prompted by a threat (or perceived threat) and that the document would not prove to be evidence of any bad action on the part of the company or the company’s management.

A records retention program is a company’s attempt to prospectively establish (1) evidence that all documents that are legally required to be preserved are in fact preserved for the required amount of time and (2) evidence that no document has been destroyed in anticipation of legal, regulatory, or governmental investigation or action.

For example, it looks bad if a regulatory agency initiated an investigation in October, and the company destroyed documents relating to the investigation in September. However, it certainly looks less suspicious if the company can establish that the documents were destroyed as a matter of course and in accordance with its document destruction schedule.

Recommended Goals and Objectives of a Records Retention Program

1. Comply with all statutory, regulatory and administrative records-keeping requirements.
2. Allow the company to periodically purge documents that are no longer subject to an affirmative duty to preserve.
3. Prevent selective and discretionary destruction of documents in such a fashion that the timing and selection of documents slated for destruction might be “second guessed” by a court of law or administrative agency.
4. Follow an established pattern of routine document destruction that is adopted uniformly by the company as a whole.
5. Provide a mechanism for halting routine document destruction when the company is put on notice of an impending lawsuit, administrative action or other controversy which would implicate documents otherwise slated for the shredder.

A records retention program is not a cure-all. If a document is destroyed in accordance with company policy, a court can still find, based on the facts and circumstances presented at trial,

that the destruction occurred at a time when the litigation was reasonably foreseeable and that a duty to preserve the document was triggered.