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Traditionally, lawyers have advised their clients to "retain records forever in case we are sued". As a result, the development of effective records retention programs have sometimes been thwarted based upon the mistaken belief that records must be kept for long periods in case they may be needed in litigation. With the increase in modern day litigation and the increased use of discovery to obtain relevant documents from adverse parties, this traditional adage related to records retention may prove to be more harmful than helpful to some organizations.

Statutes of Limitation or Limitations of Action

"Statute of limitations" or "limitation of action" are laws prescribing the time periods during which legal actions or lawsuits may be initiated. These provisions force potential plaintiffs to bring their legal actions within a reasonably short period after a problem arises. Hopefully, the statute of limitations will prevent hardships due to the passage of time. Under normal statute of limitations periods, the plaintiff will be provided a reasonable time to determine that legal action is appropriate and yet the defendants and other parties will normally still have the necessary information to support their claims.

The statute of limitations period normally starts when a specified action occurs. For example, the statute of limitations for contracts will normally begin when a breach or violation of the terms of the contract occurred and the period for personal injury begins when the injury occurred to an individual or property. The statute of limitations period may be tolled or stopped when a party is incapacitated by serious injury or age (i.e., most states will toll the statute of limitations until a child reaches age 18), or the defendant has fled the jurisdiction of the court. Once the statute of limitations time has passed, however, no future legal action may be brought related to the incident in question.

Discovery and the Subpoena of Records

Once a legal action has properly been initiated under the statute of limitations, either party will then be provided the opportunity under the rules of discovery to uncover relevant information which may be in the possession of the other party. Discovery includes the opportunity to inspect documents in the possession of the other as well as performing testing on products related to the legal action, conducting depositions of witnesses for the other party, or obtaining responses to written interrogatories or questions. The scope of discovery related to the production of records is summarized in Rule 34 of the "Rules of Civil Procedures" for the United States District Courts.

- **Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

(a) Scope.

Any party may serve on any party a request (1) to produce or permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained . . .)

The rules of discovery would also permit similar records to be obtained from persons who are not a party to the legal action in a similar manner.

The request for production of documents is normally accompanied by a "subpoena duces tecum", an order to appear in court and produce documents. The subpoena will normally indicate the scope of records to be produced. Some parties will attempt to include a broad statement of records covered to expand the opportunity to uncover additional relevant information. The court reserves the right, however, to narrow the scope of the subpoena in order to reduce unnecessary hardships or to clarify the type of information actually covered.

The party actually producing the document records may also request compensation from the court. Compensation is normally limited to approximately ten cents per page copied and is often not provided. In recent cases, litigants have not received adequate compensation or any compensation at all to cover the huge cost of document production which benefits the opposing party.

Failure to Produce Document Required by Discovery

Failure to produce documents under a discovery order may subject an organization to criminal penalties for obstruction of justice or contempt of court, or to an adverse inference which could prove harmful in litigation.¹ The "Rules of Civil Procedure for the United States District Courts" specifies the following sanctions for failure to comply with the discovery order.

- **Rule 37. Failure to Make or Cooperate in Discovery: Sanctions**

* * * * *

(b) Failure to comply with order.

* * * * *

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such order in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * * * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expense unjust.

Similar provisions are often applicable in state court proceedings.

Rule 37(b)(2) was used by a federal court in 1984 in the case of *Carlucci vs. Piper Aircraft Corporation* (1984) to penalize Piper Aircraft because of the selective destruction of relevant documents prior to and during pending litigation.² The judge in this case prohibited the defendants from introducing evidence in support of their defense, issued a directed verdict in favor of the plaintiffs, and imposed a judgment of ten million dollars.

The Impact of a Records Retention Program on Discovery

The failure to produce documents in response to a court order can effectively be overcome through the introduction of evidence indicating that the records had been destroyed in the ordinary course of business prior to litigation under an approved records retention program. This evidence should normally include testimony regarding the records retention program, documentation regarding procedures and approved schedules, and documentation indicating a systematic destruction of records over a period of time.³

When records have been destroyed prior to the start of litigation, under an approved records retention program, the records will not be available to the adverse party to assist that party in litigation. In addition, the party receiving the subpoena will be spared the huge cost of document production. The reader is cautioned, however, that harsh penalties could result from the selective destruction of records prior to litigation or even the systematic destruction of records once litigation or government investigation is pending or imminent.

Determining When Records May Be Destroyed When the Statute of Limitations Is in Effect

Since a statute of limitations only impacts the period of time during which a legal action may be brought and does not specify a legal retention period, records can in fact be destroyed even while the statute of limitations is in effect. Records should not be destroyed, however, while litigation or government investigation related to those records are imminent (about to start) or pending (has already started).⁴ Destruction of records can take place at all other times under an approved records retention program designed to meet legitimate business needs of the organization.⁵

Many attorneys advise their clients to keep records during the full statute of limitations period so that the records will be available in case of litigation. That attitude, however, assumes that the records will be more helpful than harmful during litigation. In many cases, the opposite has proven to be true — records have been effectively used by adverse parties to pursue their cases against the record holders.

The risks of keeping records for the full statute of limitations period must, therefore, be balanced against the advantages of having the records during that period. Similarly, the disadvantages of not having records needed by the organization in litigation must also be balanced against the cost and inefficiencies associated with maintaining valueless records. Some questions related to these determinations include the following:

- What are the chances of litigation?
- In case of litigation, which party would have the burden of proof?
- When does the statute of limitations take effect?

The chances of litigation and potential consequences should be evaluated carefully by competent legal counsel. In most cases, litigation will be initiated within a relatively short period after the event in question (i.e., normally within one or two years). Parties first attempt to get satisfaction from the opposing party through direct negotiations. When all else fails and litigation is the last resort, few will wait more than two years before initiating a lawsuit. Most records will be kept in the normal course of business for a few years to meet legitimate business needs; this period would also cover the normal waiting period for litigation to start.

During the actual trial, the plaintiff is responsible for "going forward with the evidence" and providing sufficient evidence to convince a judge or jury that their case is stronger than the opposing party. This is referred to as the "burden of proof." The defendant presents evidence either to weaken the case of the plaintiff or to strengthen its own. If either party does not have sufficient information, the rules of discovery permit relevant information to be obtained from the other party. If, however, the party receiving the subpoena has destroyed records in the ordinary course of business under an approved records retention program, the requesting party may likely be disadvantaged or end up losing the case.

Finally, while some statutes of limitation specify a period during which litigation must begin, some statutes (such as those related to product liability or defects in design or construction of improvements to real estate) may result in unlimited liability for an organization since a legal action may be brought at any time. The type of activities being performed will determine the period of liability under the statute of limitations.

Guidelines for Determining Whether Records Should Be Destroyed Prior to the Conclusion of the Statute of Limitations Period

The following guidelines should be considered in determining whether records may be destroyed prior to the termination of the statute of limitations. These guidelines are presented only for purposes of discussion and do not represent recommended retention criteria. Each organization should determine the records retention period which best meets its organizational needs.

- *Litigation Is Pending or Imminent.* Records should not be destroyed while litigation is pending or imminent since such destruction could result in fines and penalties for obstruction of justice or contempt of court, and could result in adverse consequences in the litigation.
- *Your Organization will be the Likely Plaintiff in Litigation.* Records should normally be kept for all or most of the statute of limitations period if your organization is likely to be the plaintiff in the litigation. Records will normally be critical in fulfilling your burden of proof and enabling you to successfully pursue the litigation.
- *The Other Party will be the Likely Plaintiff and has Little Information.* When another party will likely initiate the litigation, your organization must assess whether that party will have the necessary information to fulfill its burden of proof. If it has been determined that the other party may need to subpoena your records to obtain sufficient information to pursue its case, certain records may then become candidates for destruction in the ordinary course of business under an approved records retention program. (Please note that selective destruction of records in anticipation of litigation may be more harmful to an organization than the use of those records by an adverse party in litigation. No decision related to records retention should ever be confined to destruction of selected records. Instead, entire groups or classes of records should be destroyed in the ordinary course of business under an approved records retention schedule to meet legitimate business needs such as reduced costs and improved efficiency.)
- *Records Related to Activities Involving Small Sums of Money.* Records related to sales contracts or other activities involving small sums of money can normally be destroyed in a short period of time, even though the statute of limitations period may be longer (e.g., normally four years for sales contracts under the Uniform Commercial Code). Even if your organization was involved in litigation at a later time, the amount at risk might be minimal compared to the huge cost of maintaining these records for longer periods of time. Some sales receipts (perhaps without all the supporting documentation) might still be kept to respond to future insurance claims or tax audits.

Special Considerations for Product and Construction Records

The records retention decisions are extremely difficult for those involved in product manufacturing and distribution and for those involved in the design and construction of improvements to real estate. Most states specify that the statute of limitations related to personal injury begins at the time the actual injury occurs. Often, the injury occurs many years after the product has been manufactured or introduced in the marketplace. The manufacturer and distributor may be responsible for the entire time the product is used for such things as defects in design, defects in manufacturing, or even errors in the product instructions. Records may be needed for litigation for an indefinitely long period of time or at least until the product is no longer being used. Architects, engineers, and contractors have similar concerns related to construction or other improvements to real property.

Some states have restricted the statute of limitations for both product liability and construction to a specified period from the date of manufacture or substantial completion of the construction, respectively. Trade associations are working energetically with state legislatures and congress to develop more uniform statutes in these areas.

Since most products could be used anywhere in the United States, the restrictions imposed by some states on the statute of limitations period is generally of little value related to product liability since most states do not have similar provisions. On the other hand, an organization responsible for construction would be liable only in those locations where the construction has actually taken place. The requirements for those specific states should be reviewed in detail before making a decision related to the retention of construction related records.

Finally, a distinction must be made between liability for personal or property injury and for the breach a contract. While the statute of limitations related to personal injury may be unlimited in length in many states, the contractual obligations will be limited under the statute of limitations for written contracts. Some records may therefore be purged from the project file after the contractual obligations have ceased to exist while others continue to be maintained in case of product or construction related litigation. On the other hand, some contractual information may still be necessary to show the legal liability of subcontractors or component manufacturers for defects in manufacturing or design.

Summary

The statute of limitations indicates a period during which a legal action or lawsuit may be brought. The statute of limitations itself, however, does not specify a specific records retention requirement. Each organization must therefore determine which if any records may be destroyed under an approved records retention schedule during the statute of limitations period.

The old adage that records must be kept forever in case of litigation is now being challenged throughout the country by organizations now cognizant of the consequences of keeping records too long. In some court cases, records that could have otherwise been destroyed in the ordinary course of business under an approved records retention program have been subpoenaed by an adverse party and used successfully in litigation. The risks of keeping records for the full statute of limitations period versus destruction of records at the earliest possible date to meet legitimate business needs should be reviewed carefully with competent legal counsel. The risks associated with keeping records too long may be greater than not keeping them long enough!

Records can often effectively be destroyed under an approved records retention program prior to the culmination of the statute of limitations period. No records should be destroyed, however, when litigation or government investigation is pending or imminent.

¹ See "Legal Issues in Records Retention and Disposition Programs" [020-1030-00].

² See *Carlucci v. Piper Aircraft Corporation*, 102 Federal Rules Decisions 472 (1984), United States District Court, Southern District Florida.

³ See "Legal Issues in Records Retention and Disposition Programs" [020-1030-00].

⁴ See "Legal Issues in Records Retention and Disposition Programs" [020-1030-00].

⁵ See *Carlucci*, *Ibid.* Senior District Judge William J. Campbell concluded on page 485 of the opinion that "the defendant engaged in a practice of destroying engineering drawings with the intent of preventing them from being produced in lawsuits. Furthermore, I find that this practice continued after the commencement of this lawsuit . . ." This opinion concurs with many other judicial opinions that the selective destruction of records even prior to litigation with the intent of preventing potentially harmful records from being available during litigation is construed as a deliberate violation of the rights of the other party in discovery.

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