

## Document Retention – Good Sense Governance

### IN A NUTSHELL

- Rising threats of litigation and changes in the way associations communicate internally and with members increase the need for an association to adopt a document retention policy
- A good document retention system is an effective risk management tool
- Adhering to the policy may reduce an association's discovery costs in litigation

### NUTS AND BOLTS

First, a few cautionary tales that illustrate how costly it can be to an organization when it doesn't have a document retention system.

In May 2005, a Florida court entered a \$1.4 billion award against J.P. Morgan Co. because the company failed to properly maintain e-mails and produce them during discovery in a lawsuit. If J.P. Morgan had in place an effective document retention system, it likely would have avoided the judgment in this case. Although the award was technically reversed on appeal, this case illustrates the dangers of not having a document retention policy or system.

Another ruling by the U.S. District Court for the District of Columbia, in [\*United States ex rel. Louis Scutellaro v. Capitol Supply, Inc.\*](#) (2017), held that the failure to retain Country of Origin documentation for the products resulted in an adverse inference that the defendant did not comply with the Trade Agreements Act.

Most recently, in *QueTel Corporation v. Abbas* (2020), the Fourth Circuit Court of

Appeals upheld harsh sanctions for failing to preserve documentary evidence.

### Changes to the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedures (FRCP), which govern civil litigation in the federal judicial system, was updated in 2006 to better define litigants' obligations in retaining and sharing electronic data in a lawsuit.

These rules require a business litigant to be able to explain its system for maintaining and destroying information, including maintenance of its electronic information. As such, it has become more important that a company have a document retention policy in place. NAR recommends that all associations adopt such a system. **Creating a document retention system** Although NAR cannot provide associations with a sample policy—because no single record-retention model fits all— a summary of key considerations is outlined below to help you create a document retention system. **Identify sources and types of information**

The first step in creating a document retention policy is to identify the types of information your association produces—from the financial information your accountants produce to the content of your association publications. Depending on the size of your association, this may require gathering staff to discuss and identify all information. Be sure to include your technology staff in any such meetings so the policy can document how they maintain backup computer systems.

### **Draft the policy**

The association should address a number of items in its retention policy. Basic elements of a policy include:

- ☐ Policy's effective date and date of last review
- ☐ Person responsible for the policy
- ☐ Purpose of the policy
- ☐ Definitions
- ☐ Length of time different types of records must be retained and when they should be deleted
- ☐ Process for preserving records in the event of litigation

### **Get Legal Counsel Involved**

At this point, the association should consult legal counsel to discuss any state or federal requirements for maintaining certain information. Legal counsel also can help you navigate the requirements for each association that vary based on a number of factors. For example, certain employment statutes don't apply until a workplace reaches a minimum number of employees.

Another issue to consider is the format the association uses to maintain its documents. Reducing paper documents to an electronic format saves space but could present authentication issues in court. Therefore, all electronic documents should be stored in a read-only format or other unalterable format to demonstrate that the documents are in their original state. **Educate Employees on the Policy**

Once the record retention policy is created, it needs to be distributed to all employees. The association should make sure its employees are familiar with the policy, either through some sort of education program or a memo. How the association handles this will be a product of its size and the depth of detail in its policy. Most important, the association should make sure that employees are adhering to the policy. Having a policy that is ignored is probably worse than no policy at all.

Finally, the association should plan on periodically reviewing the policy to make sure it is still relevant and serves the association's needs. The association counsel also should periodically review the policy as part of this process.

**Association Action**

1. Review state and federal document retention and related laws with legal counsel.
2. Create a document retention policy, and train all employees on it.
3. Train officers and directors on all association governing policies, including confidentiality and retention policies, as applicable.